SUPREME COURT, U.S.

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Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-213

WERNER C. VON CLEMM ET AL.,
PETITIONERS,

v.

ROMAN ACOSTA BANUELOS ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Werner C. Von Clemm and Rayford W. Alley, Trustee, hereby respectfully request this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the First Circuit to review the decision and judgment of that court which affirmed the decision and judgment of the United States District Court for the District of Massachusetts.

Opinions Below.

The opinion of the Court of Appeals has not yet been officially reported. It is set forth as Appendix B to this petition.

The opinion of the District Court is reported in *Von Clemm* v. *Banuelos,* 365 F. Supp. 477 (D. Mass. 1973).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the court below was entered on June 3, 1974.

Questions Presented.

1. Whether the lower courts erred in dismissing plaintiff's complaint for the reason that they lacked subject matter jurisdiction for judicial review of an order of disallowance under § 32 of the Trading with the Enemy Act.

2. Whether a resident United States citizen, expressly admitted by Executive Order to the relief provisions of § 32 of the Trading with the Enemy Act, 50 U.S.C., App., § 1 *et seq.* (the Act), neither accused nor convicted of a violation of the Act during wartime, may be denied an adjudication of his title claims under that section, considering the property guarantees of the Fifth Amendment to the United States Constitution, and considering the directive addressed to the Alien Property Custodian in Executive Order No. 9095 of March 11, 1942, subsection 10 (7 F.R. 1971), *infra,* p. 30.

3. Whether the term "enemy" or "ally of enemy" can be applied to a resident United States citizen claimant, other than within the meaning of *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958). and *Manufacturers Trust Co.* v. *Kennedy,* 291 F. 2d 460 (2d Cir. 1961), the cases cited against petitioners in the courts below.

Constitutional and Statutory Provisions Involved.

The pertinent parts of Amendment V to the United States Constitution and § 32(a) of the Trading with the Enemy

Act, as amended (50 U.S.C., App., § 32(a)), are set forth in Appendix A hereof.

Summary Statement.

This suit was brought under the Trading with the Enemy Act, 50 U.S.C., App., § 1 *et seq.* (the Act), following an order of the Attorney General of the United States, dated March 22, 1971, dismissing petitioners' claims to property vested in 1942, stating that return was not "in the interest of the United States."

The property at issue was the result of legitimate import transactions which *antedated* the outbreak of war with Germany on December 11, 1941. The property at issue in the present suit consists exclusively of semi-precious and synthetic stones of German origin, imported and owned by Bridge Import Co. (Bridge).[1] The merchandise was vested in 1942 under § 5(b)(1) of the Act, as amended (First War Powers Act of 1941, c. 593, Title III, § 301; 55 Stat. 839 (Dec. 18, 1941)).

None of the property at issue came from Belgium or Holland. No diamonds are involved in the present suit. All claims were timely filed. The court, in *Von Clemm* v.

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[1] Petitioner Von Clemm was the general partner of Bridge Import Co. in which Rayford W. Alley, a corporation lawyer, was the limited partner as trustee for Von Clemm's two minor children. Von Clemm also was the organizer, and sole prevesting owner of Pioneer Import Corp. (Pioneer).

The Attorney General has (1971) distributed the assets of Pioneer, consisting primarily of the proceeds of two diamond shipments, to American and other non-enemy claimants, thereby confirming that the merchandise was *not* enemy-owned. The semi-precious and synthetic stones imported and owned by Bridge, or their proceeds, are held by the Attorney General, although they are subject to the same considerations of non-enemy ownership which induced him to release Pioneer's imported merchandise or its proceeds.

Banuelos, 1st Cir. No. 74-1036 (p. 1), duly notes petitioners' long and arduous fight for vindication.

The appellate court's opinion, *Von Clemm* v. *Banuelos,* page 3, refers to petitioner Von Clemm's ill-fated diamond importation, allegedly of Belgian origin, and to petitioner's conviction for an alleged violation of a "freezing order" (Executive Order No. 8389, as amended, May 10, 1940, 5 F.R. 1677) pertaining to such shipment, *United States* v. *Von Clemm,* 136 F. 2d 968 (2d Cir. 1943), cert. den. 320 U.S. 769 (1943). The court failed to note that the alleged shipment took place in August, 1940, *i.e.,* one and one-half years before the outbreak of war, or at a time when the Trading with the Enemy Act was not in effect.

The conviction for an alleged prewar violation of a freezing order did *not* make petitioner an "enemy" under the Act, a fact conceded in *Von Clemm* v. *Smith,* 255 F. Supp. 353 (S.D. N.Y. 1965). It is apparent, however, that that conviction continues to cast its shadow in influencing the judicial process in this case.

The Government argues that the allegedly Belgian transactions were made under the auspices of the German Military Government in Belgium and that they thus made Von Clemm a German government agent within the meaning of § 2(b) of the Act. There is, however, evidence in the possession of the Attorney General which *demonstrates* that Belgian shipments, while contemplated, never took place. *No Belgian shipment was ever made to petitioner and/or received by his firms.*

The Chief Hearing Examiner of the Office of Alien Property in his 1959 Recommended Decision (Docket 183), on the strength of the evidence then available, concluded (pp. 166, 167):

> "The correspondence between Pioneer by Von Clemm and Imico (Von Clemm's German exporter) is equivo-

cal. Von Clemm continually insisted that diamond shipments be treated as other shipments while Imico emphasized that, as to the diamonds, Von Clemm was to act only as 'trustee.' In this state of the record, I believe that the actual shipping documents should control.

"Von Clemm offered and there was received in evidence in this proceeding photostats of all the correspondence and shipping documents of all three diamond shipments. These consist of the memoranda from Pfandleihanstalt to Diamant-Kontor, from Diamant-Kontor to PEA (examination agency) in Idar-Oberstein, from PEA to the diamond cutters, from the diamond cutters to PEA, from PEA back to Diamant-Kontor, from Diamant-Kontor back to Pfandleih, thence to Imico and from Imico to Pioneer. These documents establish beyond any doubt that all these diamonds were cut in Germany and that none came from either Belgium or Holland after those countries were overrun by the German Army on May 10, 1940.

"The shipping documents also establish that the second and third shipments were not on consignment but were offered as purchased merchandise to Pioneer. Title therefore passed to Pioneer upon arrival of the goods at the post office."

The Chief Hearing Examiner's findings are *supported* by a statement of Tidemann Ulrich Lemberg (Lemberg), the Government's witness to the allegedly Belgian origin of the diamonds. The Lemberg statement and supporting document became available after the conclusion of the trial in *Von Clemm* v. *Smith, supra.* The evidence was made the subject of a motion to reopen petitioner's trial which the court denied (Law Journal, Dec. 6, 1966). The Lemberg statement and supporting document were, however,

accepted at the § 32 hearings before the Director (1970), and are thus part of the record before the Attorney General.

In weighing the legal justification of the Attorney General's order of disallowance of March 22, 1971, the Lemberg evidence cannot be ignored. A discussion of the evidence appears at page 40 of this petition.

A reviewable issue of equal magnitude is present in the court's decision in *Alley* v. *Clark*, 71 F. Supp. 521 (E.D.N.Y. 1947). The Office of Alien Property has *recognized* the legal error inherent in that court decision. The Office, as a consequence of that error, has specifically admitted these petitioners to the Act's § 32 proceedings through Special Order of the Director, dated January 1, 1953 (17 F.R. 11836, Dec. 31, 1952), *infra*, page 11.

Assuming, *arguendo*, that Von Clemm was the agent of a foreign principal, which he denies, a peacetime agent of a foreign principal does *not* become an enemy even if the principal becomes an enemy. The peacetime agent need not even register as an agent provided he is engaged in purely commercial transactions (Foreign Agents Registration Act of 1938, 52 Stat. 1245, 53 Stat. 249).

The District Court, in *Von Clemm* v. *Smith*, 255 F. Supp. 353 (1965), did *not* find that petitioner Von Clemm was an enemy under the Act but placed on him the burden to prove that he was *not an agent* of the enemy *after* December 11, 1941, the day war was declared. The court *recognized* that the term "enemy" could *not* be applied to a United States resident-citizen claimant prior to December 11, 1941. The court was careful in *distinguishing* between the term "agent" and "enemy." The Court of Appeals clearly draws the distinguishing line by stating in *Von Clemm* v. *Smith*, 363 F. 2d 19 (2d Cir. 1966):

> ". . . all the parties recognize, it is Von Clemm's status *after* December 11, 1941 . . . that determines whether he is an enemy." At p. 23 (emphasis supplied).

The Court of Appeals moreover found:

> "none of the evidence is conclusive . . . the only relevance of . . . events is insofar as they meet his [Von Clemm's] burden." *Ibid.*

The "burden of proof" question is the only one the Court of Appeals considered. The court did not consider the property rights of United States resident-citizen claimants under the Act, nor under the United States Constitution.

The Government has conceded that the present § 32 action is a trial *de novo*. In a trial *de novo* "the most extensive judicial scrutiny includes determination of 'jurisdictional' or 'constitutional facts' "(Opinion of Court of Appeals, p. 6). The principal issue in the present action is petitioners' property rights, and the safeguards the law and the United States Constitution provide pertaining to such rights. At issue also is administrative discretion, and the constitutional restraint under which it must be exercised. At issue also is the burden of proof, and the nature of that burden.

Summary of Argument.

Congress created the Trading with the Enemy Act, 50 U.S.C., App., § 1 *et seq.* (the Act) in 1917 to serve two purposes:

1. To sequestrate enemy property for the duration of hostilities;

2. To prevent trading with the enemy except under license from the President. (Infra, p. 43.)

Re 1, the Act (§ 7, 9 and 32) established procedures for lodging claims after cessation of hostilities. The claim forms permit the filing of claims by "[a]ny person, except a national of a designated enemy country," *Markham* v. *Cabell,* 326 U.S. 404, 424 (fn. 10) (1945).

Re 2, the Act established penalty procedures to deal with violations of the Act during hostilities (§§ 3, 7, 16).

The Act has placed the burden of proof in regard to beneficial title of the property claimed on the claimant. The Act has placed the burden of proof in regard to violations of the Act on the Government (§ 16). This, in essence, is the meaning of the Act against which the claims of these petitioners must be judged. Additionally, there are the constitutional considerations to which a resident-citizen claimant is entitled (U.S. Constitution, Amendment V).

Petitioners before this Court are resident United States citizens. Thus they are *non-enemies.* Their burden to prove non-enemy status within the law is the same as in *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958), and in *Manufacturers Trust Co.* v. *Kennedy,* 291 F. 2d 460 (1961), the cases cited against them on the burden of proof question in *Von Clemm* v. *Smith,* 255 F. Supp. 353 (1965), at page 355.

Petitioners are prepared to bring proof, within the meaning of *Societe* and *Manufacturers Trust, supra.* Petitioners properly filed their claims under the Act in 1942, more than 30 years ago. The resident citizen claimant is, under the Act and under the Constitution, entitled to a determination of his property rights.

The court in *Von Clemm* v. *Smith, supra,* did not find Von Clemm to be an enemy but put the burden on him to "prove a negative" (255 F. Supp. at 369). A resident

United States citizen may not be proclaimed an enemy under the Act (§ 2(c)). As a non-enemy he may, however, be charged with trading with the enemy without the license of the President (§ 3). The procedure for dealing with such a violation is established in § 16 of the Act. Conviction under § 16 carries with it forfeiture of the property involved; it makes the resident United States citizen a criminal under § 3 of the Act but *not* an enemy within the meaning of § 2 of the Act (except as a consequence of such conviction). Petitioners have neither been accused of, nor convicted for a violation of the Act during wartime.

Beneficial title determines whether a non-enemy claimant is an enemy under the Act, *Societe* and *Manufacturers Trust, supra.* Doing business with the enemy will make a neutral corporation an enemy within the Act (2(a)); doing business with the enemy without the license of the President will subject a resident United States citizen to the penalty provisions of § 16 of the Act.

In his "Order Redefining Issues and for Further Hearing" of January 18, 1952, Docket 183, Office of Alien Property, Chief Hearing Examiner Harry LeRoy Jones, formerly the Chief of the Alien Property Section of the Department of Justice with supervision over all alien property legislation and, thus, a specialist in the field, stated (pp. 11, 12):

> "Whatever the custodian has in fact acquired from a non-enemy owner, and which he holds, he can be ordered to return. Otherwise, the Act would be constitutionally deficient. cf. *Central Union Trust Co.* v. *Garvan,* 254 U.S. 554 (1921); *Becker Steel Co.* v. *Cummings,* 296 U.S. 74 (1935); *Standard Oil Co.* v. *Markham,* 57 F. Supp. 332 (1944).
>
> "Any doubt as to what is to be returned can be dissipated by reference to what was acquired. . . .

> "When the Custodian acquires physical assets, the relief under Section 9 and 32 is a return of physical assets, or their proceeds."

And at page 20:

> "As a resident American citizen who was never in enemy territory during the war, he [Von Clemm] is obviously a non-enemy, as defined in Section 2 . . . in defining the basic issues of the proceeding, the possibility of a determination under Section 32(a)(5) adverse to the claimant cannot be considered."

The court below in *Von Clemm* v. *Banuelos*, pp. 7-8, cites *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876). There the court, however, clearly stated (p. 356):

> ". . . a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause. . . ."

Von Clemm v. *Smith, supra,* did not concern itself with the question of a resident-citizen's constitutional right to be heard on his claim to beneficial title of the vested property, as granted in *Societe* and *Manufacturers Trust, supra,* the cases governing in the present suit. The very fact that petitioners are eligible for a § 32 proceeding, and *are in court under that section,* indicates that the decision in *Von Clemm* v. *Smith* did not constitute a "judgment, rendered upon the merits." The practical and legal effect of the court's decision in *Von Clemm* v. *Smith* was to remand the adjudication of petitioners' title claims to the administrative procedure under § 32 of the Act. There the *discretion* of the Attorney General as the Acting Director of the Office of Alien Property is the issue.

Reasons for Granting the Writ of Certiorari.

There are four primary issues in the present suit which are here placed in question form.

I. Did Congress intend an unconstitutional result in enacting § 32(a)(5) of the Act?

II. Can the term "enemy" or "ally of enemy" be applied to a resident United States citizen other than within the meaning of *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), and *Manufacturers Trust Co.* v. *Kennedy*, 291 F. 2d 460 (2d Cir. 1961), the cases cited against petitioners in the present litigation?

III. Is the Attorney General free to ignore the purposes of the Act, considering the directive as expressed in Executive Order No. 9095 of March 11, 1942, subsection 10 (7 F.R. 1971)? Is the Attorney General free to ignore the evidence in the record before him?

IV. May the constitutional question be avoided in adjudicating claims before the Office of Alien Property of resident-citizen claimants, not guilty of a violation of the Act?

The four issues here proposed are argued in this brief in the sequence indicated.

I.

Section 32 does Not Preclude Judicial Review of the Claims of Resident-Citizens to Just Compensation.

Claimants Von Clemm and Alley were *specifically* admitted to § 32 adjudication by order of the Director of the Office of Alien Property which issued on January 7, 1953 (17 F.R. 11836, December 31, 1952). The order was the result of recognition on the part of the then director, Dr. Rowland F. Kirks, that *Alley* v. *Clark*, 71 F. Supp. 521 (E.D.N.Y. 1947), had been *erroneously* decided.

In his "Order Redefining Issues and for Further Hearing" of January 18, 1952, and referring to *Alley* v. *Clark, supra,* the Chief Hearing Examiner had stated (p. 10):

> "Reconsideration in the clearer light of the full record in the present proceeding convinces me that it [the court's decision] was wrong. I now conclude that the Department mistakenly urged upon the court that it had no jurisdiction, and that the court was in error in dismissing the complaint. It was a Pyrrhic victory because it now appears legally impossible for this office to grant the precise administrative relief which the court concluded was exclusively available. . . ."

The Director's Order of January 7, 1953, referring to the "Order Redefining Issues and for Further Hearing", *supra,* followed.

Once admitted to § 32 procedure by special order, the judicial remedy available in that section to a resident-citizen claimant, neither charged with nor convicted of a violation of the Act, may not be withheld at the whim of the Executive.

It is a proper presumption that Congress does not intend to bring about an unconstitutional result. The fact that Congress did not make any specific provision for judicial review of claims filed pursuant to § 32 of the Act does not preclude judicial review of the questions of constitutionality or procedure. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935); *Stark* v. *Wickard,* 321 U.S. 288 (1944); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967); *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970).

The legislative history of § 32 demonstrates that the discretion granted the Executive in § 32(a)(5) "that such re-

turn is in the interest of the United States" was enacted for a special purpose. The discretion had applicability in the clearly defined area of *claims arising in enemy territory* and in the area of *intercustodial conflicts*. It was not meant to supplant the United States Constitution and the rights resident citizens enjoy thereunder. Senate Report 920, 79th Congress, 2d Session, Calendar 931, Report to H.R. 4571, clarifies the meaning of the phrase. Senator McCarran, Chairman of the Senate Judiciary Committee, there stated (page 5):

> "Paragraph (5) [of Section 32(a)] requires one more determination to be made before any return can be effected under the bill, namely, that the particular return is in the interest of the United States. . . . It is expected that this provision would bar return in doubtful cases even where the other stated conditions might appear to have been met and where, in the judgment of the State Department, for example, insufficient reciprocal protection has been afforded by a foreign country to American citizens having claims against it."

The Supreme Court in *Schilling* v. *Rogers*, 363 U.S. 666 (1960), discusses the legislative history of § 32 at length, and *confirms* the classes of claimants in regard to which the executive discretion as expressed in § 32(a)(5) of the Act applies. The Court (pp. 672, 673) identifies the classes as either "enemy nationals" (German citizens or residents) or "technical enemies" (residents of enemy-occupied territory, such as Frenchmen, or American citizens caught behind enemy lines).

Thus it is clear that, in enacting § 32 of the Act in 1946, Congress focused its attention on doubtful cases arising

in *enemy territory,* and on problems posed by *intercustodial conflicts.* These were areas in which constitutional considerations played no part. The United States Government "has the right under the war power clause of the [United States] Constitution, Art. 1, Sect. 8, Cl. 11, to confiscate property of a national of an enemy nation, and this right is not limited by the due process or just compensation clause." *Schill* v. *McGrath,* 89 F. Supp. 339, at p. 343 (S.D.N.Y. 1950). "It has been the general doctrine that citizens domiciled in enemy territory do by the rules of international law take on the status of enemies" (Judge Learned Hand in *Kahn* v. *Garvan,* 263 F. 909 (S.D.N.Y. 1920), at page 915).

It is thus necessary to *distinguish* on constitutional grounds between claims arising in enemy territory and claims arising in the United States. The constitutional rights of resident-citizen claimants were *not* voided by the enactment of § 32 of the Act. Upon enactment in 1946, § 32 became part of the Act and thus of equal weight with other sections of the Act. Section 7(c) of the Act limits judicial remedy to "that provided by the terms of this Act." The terms of the Act are as clearly expressed in § 32 as they are in § 9. The conditions the non-enemy claimant must meet and the proof of beneficial ownership he must bring are the same. The administration of both sections is governed by § 6, the "Powers and Duties" section of the Act, and by Executive Order No. 9095, *infra,* issued thereunder.

It is well to recall that § 32 was *not* conceived to serve the needs of resident-citizen claimants. Section 32 was made available to resident-citizen claimants as an afterthought. The special occasion which made the section's judicial remedy available to these petitioners was the Director's

Order of January 7, 1953 (17 F.R. 11836 of December 31, 1952), *supra*. It was an *erroneous* court decision which occasioned it (*Alley* v. *Clark, supra*).

The broadened scope of § 32 relief called for reexamination of the discretionary power as expressed in § 32(a)(5). The Executive acts on solid ground in invoking it in § 39 cases, such as in *Schilling, supra*, but he acts in violation of the United States Constitution in invoking it in the case of resident citizens not guilty of a violation of the Act (§ 16).

DIRECTOR ROWLAND F. KIRK'S ORDER OF JANUARY 7, 1953 (17 F.R. 11836 OF DECEMBER 31, 1952) MAKES RECOGNIZABLE THE CLAIMS OF RAYFORD W. ALLEY, TRUSTEE.

Director Rowland F. Kirk's Order of January 7, 1953 (17 F.R. 11836, December 31, 1952), *supra*, referring to the Chief Hearing Examiner's "Order Redefining Issues and for Further Hearing" of January 18, 1952, *ordered* the Chief of the Claims Branch to "docket for hearing all claims under Sections 9(a), 32 and 34 of the Act relating to the ownership of the property vested by the above vesting orders (Nos. 353 and 4754)," thereby *recognizing* the claims of Rayford W. Alley, Trustee.

The Chief Hearing Examiner's "Order Redefining Issues," *supra*, had stated (p. 19):

> "... the Claims Branch admits that if all claimants are eligible no debts can be paid from the vested property. . . . It argues, however, that if one claimant is found ineligible, his share cannot be returned and partnership debts must be paid from it. . . . Alley is concededly an eligible claimant. . . ."

It follows that if petitioner Von Clemm as the general partner of Bridge Import Co. is ineligible to receive re-

turn of his share of the partnership, equity requires that Alley's share of the partnership be returned under § 32 of the Act, regardless of the statute of limitations for filing debt claims. (See *Alley* v. *Clark*, 71 F. Supp. 521 (S.D.N.Y. 1947), at page 528, fn. 7).[2]

Alley is concededly an eligible claimant whose interest, right or title to the property is recognizable as a result of Dr. Kirk's Order. As the Chief Hearing Examiner so aptly stated, "Order Redefining Issues", *supra*, pp. 12, 13:

> "The first error of the Department and the court was in assuming that the question of whether a partner's interest was a property right or a debt claim should be determined by New York law. It is true that the nature of an estate vested by the Custodian usually is determined by state law; but occasionally state law concepts must be modified to meet the overriding demands of the federal statute . . . [citation].
>
> "The conception of Alley as a debt claimant is anomalous . . . a non-enemy partner has a constitutional right to recover under Section 9 whatever property may have been taken from him. He cannot be relegated to the inferior position of a debt claimant whose reme-

[2] The court recognized the dilemma and stated (p. 528, fn. 7): "One feature of the administrative procedure for the distribution of assets among debt claimants, as distinguished from persons possessing an interest, right or title, is that by which the Attorney General may bar the filing of debt claims, 50 U.S.C.A. Appendix, § 34(b); Executive Order 9788, 18 F.R. 18981. After the argument of this motion, it was learned that June 1, 1947 has, in fact, been fixed as the bar date with respect to debt claims related to the seizure here involved, 12 F.R. 1448. I do not find any analogous procedure applicable to suits based upon a claim of interest, right or title in the property. The mere fact that such a procedure does not exist, except as to debt claims, strongly suggests that co-owners or those with analogous rights, ought to be made parties, i.e., where the claim is something more than a mere debt."

dy, under Section 32, is accorded as a matter of grace, and subject to such conditions as the Congress may see fit to prescribe. *Markham* v. *Cabell,* 326 U.S. 404 (1945)."

The claims of Rayford W. Alley, Trustee, must be heard.

II.

The Term "Enemy" or "Ally of Enemy" Cannot be Applied to a Resident United States Citizen.

The appellate court (*Von Clemm* v. *Banuelos,* fn. 7, p. 4) states: "The court [*Von Clemm* v. *Smith,* 353 F. Supp. at 355-356, 367, 369] must necessarily have found that he [Von Clemm] was an 'ally of an enemy' for purposes of the Act." It is, however, apparent that the Act specifically *excludes* a resident United States citizen from such classification. The definition of "ally of enemy" (§ 2 of the Act) states in its essential parts:

> "The words 'ally of enemy' as used herein, shall be deemed to mean—
>
> (a) Any individual . . . of any nationality, resident within the territory . . . of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory.
>
> (b) The government of any nation which is an ally of a nation with which the United States is at war, or any political . . . subdivision of such ally nation, or any officer, official, agent or agency thereof.
>
> (c) Such other individuals . . . as may be natives . . . of any nation which is an ally of a nation with which the United States is at war, *other than citizens of the*

> *United States* . . . as the President . . . may, by proclamation, include within the term 'ally of enemy.' (Emphasis added.)

The term "enemy" is identically defined. It is thus apparent that the Act specifically *excludes* a *resident* United States citizen from the classification.

The Chief Hearing Examiner in his Recommended Decision (Rec. Dec.), Docket 183, *supra,* considered this aspect of the case and concluded (Rec. Dec. p. 168):

> "Von Clemm's eligibility to a return of the assets of Bridge has been vigorously denied by the Chief of the Claims Section ever since the inception of these proceedings in 1950. He is attacked as an agent of Germany and therefore an enemy as defined in Section 2 of the Act.
>
> "Von Clemm was never determined by the Custodian in any vesting order to be an enemy; consequently the burden of establishing his enemy status, in view of his residence in the United States during the war, rests upon the Claims Section."

In examining the word "agent" as it appears in § 2(b) of the Act it is necessary to consider the purposes for which the Act was created. That purpose was to impound enemy property under the war powers of the Congress and to prevent trade with the enemy except under license of the President.

It is thus apparent that the term "agent" as it appears in § 2(b) of the Act—considering the purposes of the Act—relates to the *property* of "the government of any nation with which the United States is at war," or to "any official, agent, or agency thereof" in charge of such prop-

erty. The term does not and cannot apply to a resident citizen *claiming his own property.* A resident citizen claiming his own property is not a fiscal agent, the only meaningful definition of the word "agent" in the context of the statute.

The United States citizen-claimant may lose his property rights under the statute. The criterion here is a violation of the Act within the context of its §§ 3 and 16, *i.e.,* an unlicensed transaction with the enemy, or an act of treason within the context of Article III, Sect. 3, Clause 1, the treason section of the Constitution, *e.g. Best* v. *United States,* 184 F. 2d 131 (1st Cir. 1950), cert. denied, 340 U.S. 939 (1951); *Sarthou* v. *Clark,* 78 F. Supp. 139 (S.D. Cal. 1948); *Hansen* v. *Brownell,* 234 F. 2d 60 (D.C. Cir. 1956).

Article III, Section 3, Clause 1, of the Constitution recognizes that the charge of aiding and abetting the enemy is a serious one, not to be levied at the whim of the Executive, but to be proven in a court of law with a confession in open court or with two witnesses to the alleged overt acts.

Best, Von Neindorff (Sarthou) and Hansen were disqualified as claimants under the Act on the dual grounds of residence in enemy territory and of treason against the United States. Their guilt was *established,* by due process of law, under the provisions of Article III, Sect. 3, Clause 1, of the United States Constitution. In contrast, no such guilt was established in the present case.

Petitioners are United States resident businessmen, with a record of 50 years of total loyalty to this country, engaged in an honorable profession, neither charged with, nor convicted for, a violation of the Act during hostilities.

The discretion granted the Alien Property Custodian by Congress in § 32(a)(5) of the Act does not release the Attorney General, as the Acting Alien Property Custodian, from observing the Constitution and the statute. A United

States citizen, resident in the United States during wartime, claiming his own property, is a *non-enemy* under the Act unless convicted for a violation of the Act or for treason during hostilities.

This Honorable Court is requested to find (1) that petitioners are entitled to a "hearing on the propriety of the seizure," *Societe, supra,* or, in the alternative, (2) to due process of law *as established* in Article III, Sect. 3, Clause 1, of the United States Constitution and in § 16 of the Trading with the Enemy Act.

The court in *Von Clemm* v. *Smith, supra,* recognized (255 F. Supp. pp. 368, 369): "The Act does not define the word 'agent' . . . no case exactly similar to this one has heretofore arisen." In no instance did the court cite a case even vaguely related to the one before this Court where a resident American citizen businessman is attacked for engaging in legitimate import transactions *before* outbreak of war. The court *acknowledged* that petitioners applied for presidential licenses in their dealings after outbreak of war, as the Act required; it, however, misunderstood the meaning of the licenses. The court stated (p. 369):

> "The evidence as to the affirmative acts of Von Clemm after December 11, 1941 is not extensive. . . . In substance it comes down to . . . making application for a license to pay money into a *blocked account* of Lambercier [Von Clemm's Swiss purchasing agent] in April 1942." (Emphasis added.)

Licenses for payment into *blocked accounts* were standard procedures under the regulations of the Treasury Department. See Reeves, *The Control of Foreign Funds by The United States Treasury,* 11 Law and Contemp. Prob. 17, 41 (1945). The reason why petitioners wanted to pay

into a blocked account of Lambercier, their Swiss purchasing agent,[3] was not to pay Lambercier, since they knew that the New York bank would not pay Lambercier without a further license, but to be in a position to *show proof of payment to Customs* so that the goods would be released. Petitioners also considered it important to demonstrate to Lambercier their willingness to pay, thereby avoiding any future argument on the question of title. American imports from Switzerland continued during the war. Petitioners' fellow importers were engaged in such trade. Swiss-American trade *increased* subsequent to the outbreak of war on December 11, 1941. American purchases in Switzerland, condoned by the enemy although Switzerland was surrounded by the German-Italian forces, *rose* from $27,996.525 in 1941 to $31,400,567 in 1942 (*Foreign Commerce and Navigation of the United States,* U.S. Dept. of Commerce; Bureau of Foreign and Domestic Commerce, 1941-1942).

And, as the Chief Hearing Examiner so aptly noted (April, 1959, Recommended Decision, Docket 183, p. 169):

> "Application for license is compliance not defiance of freezing regulations."

The court in *Von Clemm* v. *Smith, supra,* conceded that petitioner Von Clemm was engaged in *purely commercial transactions* and, (fn. p. 356), that he, as a United States resident citizen, could not be an "enemy" under the law as implicit in the wording of §§ 2(a) and 2(c) of the Act.

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[3] Lambercier was not a German "cloak" as the Government contends, but was duly appointed by Von Clemm as his purchasing agent in late 1940 on the recommendation of American stone dealers who had dealt with Lambercier in the past in the importation of ring stones of Swiss manufacture such as synthetic stones and marcasites.

The court did not consider the following facts, which should have had a bearing on its opinion:

(1) The Foreign Agent's Registration Act of 1938, 52 Stat. 1245, 53 Stat. 249, does not require a prewar commercial agent to register with the State Department, thus confirming that a resident-citizen importer of merchandise, assuming, *arguendo,* that he had represented a government commercially in peacetime, which is denied, *cannot* be considered an enemy of the country in which he resides. The petitioners before this court were importers, acting under sole import franchises. Under no stretch of the imagination were they fiscal agents, such as *Societe* and *Manufacturers Trust.* They were in business for their own account and risk and for private gain, facts *uncontradicted* in *the record.*

(2) Petitioner Von Clemm received no compensation from the German Government, never had access to or handled government funds, never had authority to bind the German government, and had no contact with the German government whatsoever, except by virtue of the export permits and licenses which his German exporters secured under then existing regulations.[4]

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[4] The normal assumption must be that an importer, such as petitioner Von Clemm, was in business for personal gain (and not as an agent for a foreign government with which he had no personal contact, and which neither paid, nor acknowledged him).

The facts established in this case *confirm* that petitioner Von Clemm organized his import firms with his own means, that none of his capital was contributed by others. The facts also demonstrate that Von Clemm foresaw the shortages which would develop as a result of the disruption of the normal trading pattern between the United States and Germany.

Petitioner accepted the challenge posed by the British blockade and imported synthetic and semi-precious ring stones under a revolving credit which he had established in European banks. His imports were proper and legal and had the sanction of the De-

(3) Petitioner Von Clemm has resided in the United States for more than 50 years. His import firms made no payments whatsoever to Germany (or Switzerland) subsequent to June 14, 1941, the date of the General Freezing Order (Executive Order No. 8785, 6 Fed. Reg. 2897). In fact, petitioner's payments to Germany for imported merchandise stopped at the end of 1940, *i.e.*, one year before the outbreak of war in December, 1941. The payment for merchandise which—without the importer's knowledge—allegedly ended up in an account of the German government (or the German navy) (Court of Appeals Opinion in *Von*

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partment of State. His importation of diamonds was a secondary and unessential part of his activities.

The liquidation of his inventories by the Government and the profits generated in the process testify to petitioner's acumen as a business man. It is preposterous to assume that petitioner wished these profits to accrue to the benefit of others.

Petitioner's imports were *peacetime* transactions. His imports, moreover, worked to the benefit of the United States, *not* to that of Germany (which shipped him goods on credit).

Synthetic ring stones are defense-sensitive in that they could, in an emergency, be recut to serve as bearing jewels in meters and other scientific instruments essential to the American war effort. In fact, the non-release of petitioner's goods upon arrival in 1940 and 1941 must be explained by such considerations. The denial of petitioner's applications for licenses to the Federal Reserve Bank, seeking the release of such stones at the time, has no other explanation. The point is made to indicate the desirability of the material from the Government's viewpoint. It is made for no other reason.

Petitioner had *no* contact with the German government other than the *normal* one, typical of the period, and experienced by *all* German-American importers at the time. His imports were *subject to* license which his German exporters as his correspondents were obliged to secure. Von Clemm was an importer who traded for his own account and risk; he was *not* a prewar government agent within the meaning of the Act, *supra*, p. 18. The opinion in *Von Clemm* v. *Smith*, *supra*, calls for reassessment, no different from the one in *Alley* v. *Clark*, *supra*, p. 6.

Clemm v. *Banuelos,* p. 3) took place fully two years *before* outbreak of war. The payment in question—as the importer's books demonstrate—was made to the Rotterdamsche Bank in Holland, and this is as far as the importer's knowledge went. It is immaterial where the money went. Prewar payments for imported merchandise were legal, and *standard practice.* No "freezing" regulations existed at the time.

The legislative history of the Act, moreover, demonstrates that Congress intended prewar agencies to lapse upon outbreak of war if they existed. The *"Memorandum of American and English cases"* submitted by Assistant Attorney General Charles Warren to the Congress at the Congressional hearings on the Trading with the Enemy Act in 1917 (Senate Report 113, 65th Congress, 1st Session, to accompany H.R. 4960), on which the Act is based, stated:

> "Contracts entered into with the enemy prior to the war are either suspended or are absolutely terminated; partnerships with an enemy are dissolved; partnership with a foreigner is dissolved by the same event which makes him an alien enemy. . . . No valid contract, therefore, can be made, nor can any promise arise by implication of law, from any transaction with an enemy. Exceptions to the rule are not admitted; and even after the war has terminated, the defendant, in any action founded upon a contract made in violation of that prohibition, may set up the illegality of the transaction as a defense.
>
> "Various attempts, says Mr. Wheaton, have been made to evade the operation of the rule and to escape its penalties, but they have all been defeated by its inflexible rigor."

Chief Hearing Examiner Harry LeRoy Jones, in defining agent, concluded (Rec. Dec., *supra,* p. 168):

"'Agent' is a very loose word; it is popularly used in many senses, some with a meaning almost opposite its legal meaning, for example, as in saying that a person is a 'free agent'. The fact that Von Clemm for Pioneer was given the exclusive franchise for importing Idar-Oberstein products under Germany's controlled economy does not make Von Clemm an agent of the German government. He was obviously never 'subject to the control' of the German government as a principal, a requirement of agency as defined in Section 1 of the Restatement of Agency. Von Clemm was working for Von Clemm and nobody else. Just how hard he was working for Von Clemm appears in the Group I and II findings and opinions."

THE LOWER COURTS HAVE MISINTERPRETED THE COURT'S DECISIONS IN SOCIETE AND MANUFACTURERS TRUST.

The courts in *Von Clemm* v. *Smith*, 255 F. Supp. 353 (S.D.N.Y. 1965), and in *Von Clemm* v. *Banuelos*, No. 74-1036), (1st Cir. 1974), refer to *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), and *Manufacturers Trust Co.* v. *Kennedy*, 291 F. 2d 460 (2d Cir. 1961), as indicative of the burden of proof a non-enemy claimant must carry (*Von Clemm* v. *Smith*, at page 355; *Von Clemm* v. *Banuelos*, at page 4, fn. 6).

Petitioners *accept* the law as established in *Societe* and *Manufacturers Trust, supra.*

Manufacturers Trust was the depository of German governmental funds, the Reichsbank being a government agency within the wording of § 2(b) of the Act. Manufacturers Trust was thus an "agent" (fiscal agent) within the meaning of § 2(b) of the Act.

Yet, giving proper recognition to the fact that a resident United States citizen (or corporation) may not be pro-

claimed an enemy under the Act (§ 2(c)), the court and the Government agreed, and so stipulated (291 F. 2d at 462), that Manufacturers Trust was *not* "an enemy or ally of enemy" within the meaning of the Act. In *Manufacturers Trust,* the court said (p. 467-468):

> "The burden which appellants must here sustain consists of a showing that they were the beneficial owners of the fund sought. *LaDue & Co.* v. *Rogers,* [7 Cir., 259 F. 2d 905]; *Feller* v. *McGrath,* D.C.W.D. Pa., 106 F. Supp. 147 [and other citations]."
>
> . . . . . .
>
> "As was stated in *Feller* v. *McGrath, supra,* 106 F. Supp. at p. 149:
>
> 'Section 9(a) of the Trading with the Enemy Act requires that a plaintiff "establish" the "interest, right or title" he claims. This means plaintiff has the burden of establishing that he is the beneficial owner of the property involved. . . . Beneficial ownership is the heart of the case: it is part of plaintiff's prima facie case.' "

The position of *Societe* was analogous to that of *Manufacturers Trust.* Societe's burden was to show that it was not an agent of I.G.-Farben, the German Chemical Trust, whose property it allegedly shielded.

Although fiscal agents within the meaning of § 2(b), Societe and Manufacturers Trust were *not* denied a trial on the merits. Thus these cases—the only ones cited against petitioners before this Court on the burden of proof question—demonstrate the burden a non-enemy claimant must carry. It is proper to conclude that the burden is a property concept. The cited cases clearly establish that a non-

enemy—although an agent within the meaning of § 2(b) of the Act—may bring proof of his non-enemy status by virtue of his proof of beneficial ownership. The Act is not a punitive device.

> "[T]he statute was aimed at protecting the nation, not at punishing persons, however ill-disposed, who did it no harm." Judge Learned Hand in *United States* v. *Leiner*, 143 F. 2d 298, 301 (2d Cir. 1944).

The appellate court (p. 6), citing *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211 (1958); *Stoehr* v. *Wallace*, 255 U.S. 239, 245-246 (1921), states:

> "But in none of such cases were the status of the claimant and the claimant's burden to establish his non-enemy status in issue."

The court's statement is not only in startling contradiction of the court's finding in fn. 6 at page 4 of the opinion (where the court cites *Societe* and *Manufacturers Trust*), but demonstrates *unfamiliarity* with the cases and with the meaning of the Act. The Supreme Court said in *Societe* at page 212:

> "In seeking recovery of the . . . assets, petitioner recognizes that it carries the ultimate burden of proof of showing itself not to be an 'enemy' within the meaning of the Trading with the Enemy Act."

The Supreme Court then clarifies the "meaning of the Trading with the Enemy Act" by stating (pp. 212-213):

> "It may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious handicap. . . . But these problems go to the

> adequacy of petitioner's proof and should not . . . preclude petitioner from being able to contest on the merits."

It is thus "adequacy of proof" in a "contest on the merits" which determines whether a non-enemy claimant who timely filed his claims is an "enemy" within the meaning of the Act.

As in *Societe Internationale, supra,* and referring to the December 18, 1941 amendment of § 5(b) of the Act (First War Powers Act of 1941, c. 593, Title III, § 301, 55 Stat. 839), the Circuit Court found in *Standard Oil Co. (New Jersey)* v. *Clark,* 163 F. 2d 917 (2d Cir. 1947), at page 925:

> ". . . the effect of the change in law is to enable the government to meet the real evil of the cloaking of enemy property interests by apparent holdings by nationals of friendly powers. Seizure is permitted against such nationals, who can then secure a return only upon showing that the property is genuinely their own."

The court thus clarified the essential meaning of the expression "burden of proof" as applied in its decision and as applicable to claims arising under the Trading with the Enemy Act. The burden is one to show "that the property is genuinely their own." Such burden is one of title, and not of eligibility. A resident American citizen is constitutionally entitled to lodge his claim for restitution unless guilty of a violation of the Act.

The appellate court's decision in *Von Clemm* v. *Banuelos, supra,* (pp. 6, 7) indicates *sympathy* with petitioner's position on the burden of proof question. This petition is directed to the Supreme Court for a ruling which will grant petitioners the right to *claim* their property, identical to

that granted in *Manufacturers Trust* and *Societe Internationale, supra.* There the claimants—in spite of their alleged "enemy" status—were permitted to establish beneficial title to the vested property within the purview of Executive Order No. 9095, *infra.*

In reaching its conclusion that Von Clemm was an "agent" of the German government *prior to* outbreak of war on December 11, 1941, the court in *Von Clemm* v. *Smith, supra,* made no attempt to construe the term by reference to the statute, its legislative history or other usual tools of construction. Nor did the court apply elementary principles of agency, that the agent be subject to the control of, have power to act for, and bind his principal.

Importers, such as these petitioners, engaged in business *for their own account and risk,* before hostilities, and again since cessation of hostilities, are *not* agents within the meaning of § 2(b) of the Act, except in the context of *Societe* and *Manufacturers Trust, supra.* These petitioners urge upon this Court that they are entitled to the legal process established in these cases. Their burden of proof cannot be greater, nor different from the one demanded in *Societe* and *Manufacturers Trust,* both allegedly German agents within the meaning of § 2(b) of the Act. Their burden was to show that they were *not* fiscal agents" but that the vested property was "genuinely their own," *Standard Oil Co. (New Jersey)* v. *Clark, supra.*

Petitioners maintain that the history of the Act, *infra,* p. 43, and the cases, establish that Congress intended to give to non-enemies, such as Societe, Manufacturers Trust and Von Clemm, all similarly accused, "a later judicial hearing as to the propriety of the seizure," *Societe, supra,* at page 211.[5]

[5] Section 2 of the Act, unchanged in its phrasing since inception of the Act, applies to enemy nationals (and to foreign cor-

III.

The Attorney General as the Acting Alien Property Custodian may Not Ignore the Purposes of the Act.

No resident-citizen of the United States has ever had his property taken from him under the provisions of the Act unless convicted of a violation of the Act during wartime (§§ 3 and 16 of the Act), or unless convicted of treason under Article 3, Section 3, Clause 1 of the Constitution of the United States *e.g., Best* v. *United States, supra.* No resident citizen of the United States, not so convicted, has ever been denied an adjudication of his property rights, established by Executive Order No. 9095, promulgated March 11, 1942, 7 F.R. 1971, which states (subsection 10):

> "For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me [the President of the United States] by section 5(b) of the Trading With the Enemy Act, as amended [Section 5(b) of this Appendix]." (Executive Order 9095 appears as a footnote under § 6 of the Act, the latter captioned "Alien Property Custodian: general powers and duties.")

Innumerable Supreme Court decisions have established that the Fifth Amendment to the United States Constitu-

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porations doing business with the enemy). A "non-enemy" resident citizen becomes an "enemy" within the meaning of the Act, only by *failure* to bring proof of beneficial title, or by a wilful violation of the Act (§§ 3 and 16 of the Act).

tion governs the Act.[6] "The existence of a right upon the part of (plaintiffs) to regain (their) wrongfully seized property, and to do so completely, is essential to the constitutionality of the Act." *Standard Oil Co. (New Jersey)* v. *Markham*, 57 F. Supp. 332, 334 (S.D.N.Y. 1944).

The Act itself, in § 2, prohibits the President of the United States from including a citizen of the United States, by proclamation, within the term "enemy."[7]

Due process requires that a resident citizen's title claims be heard and established under the Act, not as a matter

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[6] *E.g.*, *Societe Internationale* v. *Rogers*, 357 U.S. 197, 210-211 (1958); *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319 (1952); *Becker Steel Co. of America* v. *Cummings*, 296 U.S. 74, 79 (1935); *Silesian-American Corp.* v. *Markham*, 156 F. 2d 793 (2d Cir. 1946); *Josephberg* v. *Markham*, 152 F. 2d 644 (2d Cir. 1945); *Kotohira Jinsha* v. *McGrath*, 90 F. Supp. 892 (D. Haw. 1950); *Standard Oil Co. (New Jersey)* v. *Markham*, 64 F. Supp. 656 (S.D.N.Y. 1945); *Duisberg* v. *Crowley*, 54 F. Supp. 365, 367 (D.C.N.J. 1944).

[7] The term "enemy" under the Act (§§ 2 and 9) applies to enemy nationals or enemy entities and to persons of whatever nationality, domiciled in enemy territory. The term does *not* apply to resident United States citizens. The term "enemy" includes:

> "individuals . . . as may be natives, citizens or subjects of any nation . . . with which the United States is at war, *other than citizens of the United States. . . .*" (2c) (emphasis ours).

The holding of *Von Clemm* v. *Smith*, 255 F. Supp. 353 (S.D.N.Y. 1965) aff'd 363 F. 2d 19 (2d Cir. 1966), cert. den. 385 U.S. 975 (1966), is that Von Clemm lacked standing to claim return under § 9 of the Act because Von Clemm, whom the court found to have been an agent of the German government *prior* to December 7, 1941, *failed to prove* that *he had ceased* to be such an agent after December 7, 1941. Failure to prove a "negative" (Opinion, p. 369) does not make a United States citizen an "enemy" under the Act. Therefore the court in *Von Clemm* v. *Smith*, *supra*, failed to find that Von Clemm was in fact an "enemy" within the meaning of the Act.

of grace, but of entitlement.[8] The "national interest" here involved is to uphold the United States Constitution. A resident citizen shall not be deprived of his property without due process and just compensation. For these reasons, this case involving resident United States citizens, against whom no act of disloyalty has been alleged, much less proven, is unique and may be distinguished from any other case previously decided under the Act.

The Government's position in the case before the court is inequitable because it ignores the basic meaning of the Act, as expressed in Executive Order No. 9095, *supra*, p. 30). The Supreme Court opinion in *Markham* v. *Cabell*, 326 U.E. 404 (1945), takes a deep look into the labyrinth which the Trading with the Enemy Act, so frequently amended, represents. The Court deals at length with Executive Order No. 9095 (pp. 423-424) and accords its meaning and direction "full scope." The Court particularly refers to the language of the vesting orders (p. 424, fn. 10) which permit the filing of claims by "[a]ny person, except a national of a designated enemy country." Thus there is a clear distinction between the rights of enemy nationals (residents and/or citizens of any enemy country) and those of United States citizens, resident in the United States of America. Congress so recognized in enacting § 39 of the Act,[9] which destroyed the property rights of enemy nationals but did not affect those of United States resident-citizen claimants.

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[8] As Judge Learned Hand so clearly stated:

"By the capture nothing is condemned, nothing confiscated, nothing concluded." *Kahn* v. *Garvan*, 263 F. 909, 916 (1920).

". . . nothing is settled by the capture itself except bare sequestration of the property in the hands of the Alien Property Custodian." *Stochr* v. *Wallace*, 269 F. 827, 834 (S.D.N.Y. 1920).

[9] Section 39 in its essential parts reads:

"No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred

SCHILLING V. ROGERS, UPON WHICH THE LOWER COURTS RELIED, DEALT WITH THE CLAIM OF AN ENEMY ALIEN AND IS NOT APPLICABLE TO THIS CASE.

The lower courts cite *Schilling* v. *Rogers*, 363 U.S. 666 (1960); *Bantel* v. *Brownell*, 234 F. 2d 692 (D.D. Cir. 1956); *Pflueger* v. *United States*, 121 F. 2d 732 (D.C. Cir. 1941), cert. den. 314 U.S. 617 (1941); *Goldschmidt* v. *Sutherland* (erroneously designated *United States* v. *Sutherland*), 51 F. 2d 607 (D.C. Cir. 1931), cert. den. 284 U.S. 667 (1931); *Legerlotz* v. *Rogers*, 266 F. 2d 457, 459 (D.C. Cir. 1959); *McGrath* v. *Zander*, 177 F. 2d 649 (D.C. Cir. 1949), as indicative of the unavailability of judicial remedy *on the question of just compensation* under § 32(a) of the Act. The courts' views contrast with the District Court's finding *Von Clemm* v. *Banuelos*, 365 F. Supp. 477, 481 (D. Mass. 1973), that "the Act actually confers two separate and mutually independent methods of seeking relief to aggrieved claimants."

It is clear that these cases cited by the defendants and referred to by the lower courts are inapposite. Thus an analysis of the cases is in order.

The *Schilling* case dealt with the claims of an enemy alien, a German national who resided in enemy country (Germany) during wartime. "The Anglo-American test of

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to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act [sections 1 to 6 [and] 7 to 39 . . . of this Appendix], shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act . . . of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. *Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 . . . of this Act.*" (*Emphasis ours.*)

enemy character is based on domicile" (Hall's *International Law*, 8th Ed., par. 168). Schilling was permanently disqualified as a claimant under the Act by domicile as a result of the addition of § 39 to the Act in 1948 which confiscated the property of German nationals and directed them to seek compensation from their own government.

Schilling nevertheless brought an action against the Attorney General under § 32(a) of the Act in the hope that he would classify as a "persecutee" within the meaning of § 32(a)(2)(D) of the Act and thus be qualified to receive compensation for his vested property.

It is within this specialized area that the *Schilling* case must be considered. In exercising his discretion with respect to a German national, the Attorney General was not called upon to consider constitutional questions. Schilling did not enjoy the protection of the Constitution.[10] In contrast, United States citizens, resident in the United States before, during and after the war, are protected by the prop-

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[10] The United States Government "has the right under the war power clause of the [United States] Constitution, Art. 1, Sect. 8, Cl. 11, to confiscate property of a national of an enemy nation, and this right is not limited by the due process or just compensation clause." (*Schill* v. *McGrath*, 89 F. Supp. 339, 343 (S.D.N.Y. 1950).

Schilling's disqualification, however, was not absolute. The principle of the Act which has found expression in the phrase "vested for protective purposes," *i.e.*, that there should be temporary but not permanent confiscation, was reaffirmed by the President of the United States at the time § 39 was added to the Act. The "Convention of the Settlement of Matters arising out of the War and the Occupation" signed at Paris on October 23, 1954, by the Allied Governments and Germany, provided in Article 5: "The Federal Republic [of Germany] shall ensure that the former owners of property seized pursuant to the measures . . . shall be compensated." Schilling was a citizen of Germany, and, after the Attorney General's order of disallowance in his case, became eligible for compensation in Germany. This additional relief accorded Schilling is not available to petitioners as United States citizens.

erty guarantees of the Fifth Amendment. When the Supreme Court stated, at 674, in the *Schilling* case that "the history of § 32 impels [the belief that] the permissive terms in which the § 32 return provisions are drawn . . . indicate that their administration was committed . . . to the discretionary judgment of the Executive branch," it was considering a § 39 *case*.

The Court stated in this respect (p. 668-669):

> "The particular provision involved in this case is paragraph 2(D) of § 32(a), which makes ineligible citizens of certain enemy countries who were present in those countries after the onset of hostilities, and its first proviso . . . which exempts from that ineligibility . . . victims of persecution. The question for decision is whether the District Court had jurisdiction to review a determination of . . . respondent Attorney General, holding this proviso inapplicable to the facts presented by the petitioner's claim."

A reading of the Court's opinion (pp. 671 through 677) makes it clear that the Court in Schilling considered a *claim arising in enemy territory* and that it confined the Attorney General's determination to that type of claim.

The Court did not consider claims of United States resident citizens but methodically referred to "enemy claims" (p. 671), "property of enemy national-residents" (p. 672), "persons having an enemy status" (p. 672), "nationals and residents of enemy countries" (p. 672), "relief to enemy nationals (p. 673), "a technical enemy, a Frenchman" (p. 672), "return claims by technical enemies" (p. 673). The Court further qualified its decision by concluding (pp. 676-677):

> "We conclude that the Trading with the Enemy Act excludes a judicial remedy *in this instance*. . . . This is not a case in which it is charged . . . that an administrative official has . . . acted beyond the scope of his powers, where the availability of judicial review would be attended by quite different considerations. . . ." (Emphasis ours.)

To summarize, it would seem proper to read the language employed by Justice Harlan in the *Schilling* opinion in context with the Justice's other pronouncements and with other decisions of the Supreme Court. The language in *Schilling* upon which the lower courts relied in finding against petitioners did not invalidate the Justice's constitutional and common law views. Justice Harlan referred to enemy nationals, not to United States resident citizens. In stating "the permissive terms in which the § 32 return provisions are drawn persuasively indicate that their administration was committed entirely to the discretionary judgment of the Executive branch 'without the intervention of the courts' " (p. 674), Justice Harlan did not consider constitutional implications which are present in this case. The discretion in *Schilling* did not involve a constitutional question but a discretionary finding on Schilling's alleged persecutee status. Schilling was totally disqualified as a claimant by law (§ 39 of the Act) and depended on "grace," not on constitutional right.

The reviewability of questions of constitutionality or procedure in administrative proceedings has been reaffirmed in innumerable Supreme Court decisions. Cf. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 141 (1967); *Data Processing Service* v. *Camp*, 397 U.S. 150, 156, 157 (1970); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 432, 433 (1935); *Stark* v. *Wickard*, 321 U.S. 288, 310 (1944); See also: *Gon-*

zalez v. *Freeman*, 334 F. 2d 570, 575 (D.C. Cir. 1964); *Pennsylvania Railroad Co.* v. *Dillon*, 335 F. 2d 292, 294 (D.C. Cir. 1964); *Williams* v. *Ribicoff*, 323 F. 2d 231, 232 (5th Cir. 1963).

The Administrative Procedure Act itself confirms:

> "Nothing in this Act shall be held to diminish the constitutional rights of any person. . . ." (60 Stat. 244, § 12 (1946).)

It is petitioners' view that *Schilling* bears no relationship to the case before this Court. There is no similarity between the two cases, either in law or in fact. The Supreme Court emphasized in *Schilling* that "different considerations than those controlling" in *Schilling* would lead to different conclusions (p. 677). The different considerations of which the Court speaks are summarized as follows:

(1) There was no dispute on ownership in *Schilling*. In contrast, ownership of the vested property is the central issue of this litigation. The citizen-importer petitioners are, under the law, entitled to an accounting of the seized merchandise and to a judicial determination of prevesting title. (Executive Order No. 9095, supra, p. 30.)

(2) Schilling, an enemy national, was permanently barred from relief by § 39 of the Act. In contrast, petitioners as resident United States citizens are not barred from relief by § 39 of the Act which section applies to citizens and residents of enemy countries only.

(3) Schilling did not enjoy rights under the United States Constitution, *Schill* v. *McGrath*, *supra*, fn. 10, p. 34. In contrast, the rights of resident United States citizens under the Fifth Amendment have been reaffirmed in innumerable Supreme Court decisions.

(4) In *Schilling*, the "general powers and duties" of the Alien Property Custodian as defined in § 6 of the Act

and as further defined in Executive Order No. 9095, subsection 10, were inapplicable in view of the addition of § 39 to the Act. In contrast, the power granted to the Administrator in § 6, as further defined in Executive Order No. 9095, subsection 10, is final and conclusive as to the power or authority conferred upon the President of the United States by the Congress under § 5(b) of the Act and thus final and conclusive as to the rights of resident-citizen petitioners thereunder.

The other cases cited by the lower courts are not applicable to the cause before this Court on other grounds.

In *Bantel, supra,* plaintiffs-appellants were disqualified in the words of the court, at 693, as "citizens and residents of Germany . . . prima facie barred from relief under Section 9(a) by the express language of that section." The court would have come to the same conclusion had it considered the case under § 32(a).

Pflueger, supra, was decided in 1941; there was no judicial remedy available in 1941 other than § 9(a), because § 32 had not yet been enacted.

In *Goldschmidt, supra,* decided in 1931, there was no judicial remedy available, other than § 9(a), for the same reason.

The significant aspect of *Pflueger* and *Goldschmidt, supra,* is the fact, although enemies under the law due to their residence in Germany during the war, *just compensation* was paid for the vested properties within the jurisdiction conferred by Congress.

The *Pflueger* and *Goldschmidt* actions concerned, not the question of their property rights as such, but whether they were entitled to additional compensation. The court thus did not rule on property rights as such, but on an "accounting question." The court's denial is based on jurisdictional grounds. The court, referring to § 7(c) of the Act, stated:

> "The right of recovery is restricted to the property seized or the proceeds derived from the sale. . . . This measures the jurisdiction conferred by Congress." *Pflueger* v. *United States, supra,* p. 734.

The court's denial in *Goldschmidt* followed the same reasoning as in *Pflueger. Legerlotz* v. *Rogers, supra,* was cited by the District Court in support of its statement "The Act actually confers two separate and mutually independent methods of seeking relief to aggrieved claimants." *Von Clemm* v. *Banuelos,* 365 F. Supp. 477, 481 (D. Mass. 1973). The plaintiff (Legerlotz) was awarded "approximately $733,000" in compensation for the property seized from him. As in *Pflueger* and *Goldschmidt,* the *Legerlotz* dispute concerned, not *just compensation,* but an accounting question. Legerlotz sought an adjustment of certain retained amounts through a suit under § 9(a). The court, however, finding that the statute of limitations had run on the action under § 9(a), stated (p. 459): "It seems plain that there was no genuine issue."

Bantel, Pflueger, Goldschmidt and *Legerlotz* shed no light on the question of reviewability of § 32 denials *to just compensation,* nor on the question of administrative powers and duties, as expressed in § 6 of the Act, and in Executive Order No. 9095 issued thereunder, which are the issues in the present cause before this court.

McGrath v. *Zander, supra,* is inapposite in that the claimant there was disqualified by residence. Claimant Zander nevertheless was awarded *just compensation,* the courts giving equal weight to §§ 9 and 32.

The lower courts in *Von Clemm* v. *Banuelos, supra,* failed to take notice that the cases here cited are not applicable in that (1) they arose in enemy territory and (2)

that *just compensation was paid to all cited claimants* (with the exception of *Bantel* where claimants were disqualified "as citizens and residents of Germany").

Petitioner Von Clemm's Alleged Violation of a Freezing Order Before Outbreak of War.

The appellate court's opinion in *Von Clemm* v. *Banuelos*, page 2, states "appellant's trade in Belgian and Dutch diamonds was threatened," and, page 3, "One of the diamond shipments, arranged through intermediaries, cleared customs." "Other shipments similarly arranged were seized by customs and are the crux of this suit." It is, however, a fact that *no diamond shipments whatsoever are involved in the present suit* and that the Government has distributed the proceeds of the seized diamond imports to American and other non-enemy claimants, *supra*, p. 3, fn. 1. The Pioneer Import Corporation (Pioneer), petitioner Von Clemm's other import firm.

The *positive* findings of the Chief Hearing Examiner, page 5, *supra*, as to the *German* origin of the diamonds, are fully supported by affidavits and statements of Tidemann Ulrich Lemberg (Lemberg), the witness on whom the court relied in *Von Clemm* v. *Smith*, *supra*. Lemberg had erroneously testified that *six* packages of diamonds had been sent from Antwerp to Berlin in the 1940-1941, period, whereas the documents on which he relied, written in the Flemish language, demonstrate that *six packages of diamonds stayed in Antwerp, i.e.*, were not sent from Antwerp to Berlin. Lemberg had at the time of his testimony *misinterpreted* the Flemish language. He discovered his error in 1966. He promptly advised Bruno A. Ristau, the Government's attorney.

The discovery of his error and his sworn testimony pertaining to the error did not arrive in time for the trial in *Von Clemm* v. *Smith, supra.* It was, however, made the subject of a *motion* by petitioner for a reopening of the trial before the court. The motion was made after the conclusion of the trial; it was denied without a hearing (Law Journal, December 6, 1966).

Petitioner Von Clemm, already in business with *German* diamond cutters, *contemplated* entering the Belgian diamond business in response to the request for help made by refugee Belgian diamond dealers in New York. No shipment of Belgian (or Dutch) diamonds, however, ever took place, the German Military Government in Belgium having *vetoed* any shipment via German exporters.

The Attorney General has a complete file on these events. The documents, and Lemberg's affidavit correcting his erroneous testimony, are *part of the record* in the Attorney General's office. (Docket 183.) The German origin of the diamonds has been thoroughly established in that docket. The matter has been thoroughly briefed before the Bureau. Descriptions or facsimiles of the documents in question are attached to this petition as Appendix C.

The alleged violations concerning petitioners' imports, other than the one concerning the first diamond shipment made to Pioneer Import Corp. (Pioneer) in August, 1940, have never been formulated, nor judicially determined. The Chief Hearing Examiner *rejected* the claims of the Commissioner of Customs out of hand (Rec. Dec. p. 173). [11]

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[11] In considering the claims of the Commissioner of Customs (Rec. Dec. p. 173), the Chief Hearing Examiner concluded:

> "Upon seizure . . . the Government through Customs obtained a possessory lien, not title, with a right to bring libel proceeding in the district court for forfeiture. The Commissioner argues that he turned over the seized merchandise to

Bridge Import Co. (Bridge) never engaged in the diamond trade. The import transactions engaged in by Bridge were peacetime transactions in *semi-precious* and *synthetic ring stones,* manufactured in Germany's famous stone-cutting center, Idar-Oberstein, and imported legally prior to outbreak of war. The Chief Hearing Examiner has established that there is no enemy interest in the stones. He concluded (Rec. Dec. pp. 166 and 171):

> "The Custodian was correct, in my view, in his original findings that the stones were owned prior to vesting by Bridge and Pioneer. . . . I conclude from all the facts . . . that Von Clemm is not an enemy and is eligible for a return of the assets of Bridge Import Company."

IV.

THE CONSTITUTIONAL QUESTION CANNOT BE AVOIDED IN ADJUDICATING CLAIMS BEFORE THE OFFICE OF ALIEN PROPERTY OF RESIDENT-CITIZEN CLAIMANTS, NOT GUILTY OF A VIOLATION OF THE ACT.

Petitioners are German-American importers, engaged for more than 40 years in purely commercial import transactions. Their status is that of resident citizens, *i.e.* of non-

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the Alien Property Custodian after vesting because the vesting was the assertion of a superior governmental power which superseded the operation of the customs laws. No authority is cited for this position and I know of no reason why the Trading with the Enemy Act could be considered as stilling the effect of the custom laws. . . . While, therefore, it appears that the Commissioner of Customs had a proprietary interest in the vested property immediately prior to vesting, that interest was lost upon turning over possession to the Alien Property Custodian and upon his sale of the merchandise. There appears to be nothing now which can properly be returned to the Commissioner by an allowance of his title claim."

enemy claimants. The fact that petitioners were in court under § 9(a), and are now in court under § 32, confirms their non-enemy status.

> "The Anglo-American test of enemy character is based on domicile" (Hall's *International Law*, 8th Ed., par. 168).

The importance of domicile in alien property cases is demonstrated by a reading of §§ 9(b)(4) and 9(b)(5) of the Act. The sections indicate that there is to be return of vested property even to enemy nationals provided the "property concerned was within the territory of the United States by reason of . . . service" or if such enemy national "is at the time of the return of his money or other property hereunder living within the United States." The sections demonstrate that *residence* is the dominant criterion in establishing beneficial title and in settling claims under the Act.

The purposes of the Act were clearly expressed by the legislators at the time of enactment. Congress said in 1917, Senate Report 113, 65th Congress, 1st Session (to accompany H.R. 4960), citing from the report submitted by Assistant Attorney General Warren:

> "The present bill is less stringent, and designedly so, than the English act. And it is less stringent than the law of trade with the enemy as laid down by our courts, for it provides for a *system of licenses* by which any act or business forbidden by the bill may be licensed to be done, if the President shall be of opinion that it can be carried on or done with safety to the United States. The provisions of this bill greatly amplify and make more practical a system of license or permit which was provided for by the government during the Civil War. . . .

"One of the most important features of the bill is that which provides for the temporary taking over of enemy property, its conservation in the hands of the alien property custodian, and its investment in United States bonds. . . . In other words, we fight the enemy with his own property during the war; but we do not permanently confiscate it. Moreover, this temporary conscription of enemy property is also conservation of enemy property; for it is taken . . . and invested in the safest security in the world—United States bonds—or deposited in government depositaries." (Emphasis supplied.)

The basic principles of the Act have not changed since Assistant Attorney General Warren stated them. The pledges then given have never been broken. The principle that there shall not be "permanent confiscation" but only "temporary conscription" *was affirmed* by the President of the United States at the time § 39 was added to the Act (1948 U.S. Code Cong. Service, p. 2317). Section 39 decreed the *confiscation* of properties or interests of Germany or Japan and their nationals; the President, however, saw to it that the victims of such confiscation were assured compensation. The "Convention of the Settlement of Matters Arising out of the War and the Occupation" (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany signed at Paris on October 23, 1954) states in Chapter Six:

"*Article 3.*

"1. The Federal Republic shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of

reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany."

. . . . . .

"*Article 5.*

"The Federal Republic shall ensure that the former owners of property seized pursuant to the measures referred to in Articles 2 and 3 of this Chapter shall be compensated."

The Federal Republic of Germany thus assumed the obligation to compensate its own citizens. It signed the Protocol, *supra,* as did the United States.

It is thus clear that the law adheres to the original intent, and that the President so recognized. The issue here then is whether the principle recognized by the President may be ignored by his surrogate, the Attorney General.

The District Court below conceded that this is a trial *de novo,* and that the Act confers "two separate and mutually independent methods of seeking relief to aggrieved claimants." In a trial de novo *all* evidence in the record must be considered, all previous court decisions may be reviewed. Congressional intent, the law itself, are up for scrutiny.

Congress, in enacting § 32 of the Act, did *not* intend an unconstitutional result. The discretion granted the Attorney General in § 32(a)(5) is applicable to claims *arising in enemy territory, i.e.,* to "doubtful cases" and to those affected by "intercustodial conflicts," *supra,* p. 13. It is *not* applicable to claims arising in the United States. The claims of resident-citizen claimants are subject to the criteria established in Executive Order No. 9095, *supra,* to

the imperatives written into the United States Constitution and to the meaning of the Act, *read as a whole.*

It is the contention of these petitioners that the Congress has at no time authorized the confiscation of the property of a fellow citizen, *unless* a wilful violation of the Act has been established and *unless* there has taken place a forfeiture proceeding under the rules of the Act as expressed in § 16. Any other interpretation would make the Act constitutionally deficient.

The refusal of the Attorney General to offer these petitioners a hearing at which the beneficial title of the property of Bridge Import Co. will be the issue, calls for *judicial review.* This Court has said on similar occasions:

> "Legislative agencies . . . may be expert and impartial. . . . But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."
>
> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38 (1936), at pp. 52, 84.

Under constitutional, as well as under international, law, as expressed in innumerable Supreme Court decisions and

in innumerable treaties of friendship, commerce and navigation, private property may not be taken for public use without just compensation. Under national, as well as under international concepts of law, due process requires that an accusation of disloyalty, such as serving an enemy nation as an agent during wartime, be proven in a court of law under the applicable statutes. The applicable statutes in the United States are the treason section of the Constitution, Articles 3, sect. 3, Clause 1, and § 16 of the Trading with the Enemy Act, *e.g., Best* v. *United States,* 184 F. 2d 131 (1st Cir. 1950), cert. den. 340 U.S. 939 (1951).

Barring conviction under these statutes, a resident United States citizen cannot be termed an "enemy" or "ally of enemy" in an action in which he seeks return of his *own* property, until and unless his property claim is defeated by his inability to sustain his burden of proof of beneficial ownership. That proof determines whether he is an "enemy" within the meaning of § 2(b) of the Act, the word "agent," as there appears, having the meaning of "fiscal agent." *Societe, supra,* and *Manufacturers Trust, supra.*

> "As construed by the Supreme Court, its [the Act's] effect was by the seizure to transfer title from the alien to the United States, with a reservation, however, that if the seizure was erroneous and the property was *not enemy-owned,* its recovery could be secured in a suit brought by the owner against the Alien Property Custodian or the Treasurer as agents of the United States. . . ." *Cummings* v. *Hardee,* 102 F. 2d 622 (Cir. 1939), at page 627 (emphasis added).

And, as this Court so clearly stated, emphasizing the principles of the Act:

> "Past decisions of this Court emphasize that this summary power to seize property which is believed

> to be enemy-owned is rescued from *constitutional invalidity* under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a nonenemy claimant a later judicial hearing as to the propriety of the seizure [citations]." (Emphasis ours.) *Societe, supra,* p. 211.)

And, in *Honda* v. *Clark,* 386 U.S. 484 (1967), at page 498: "The Attorney General is a mere stakeholder, a custodian in the true sense of the word."

In leaving *unresolved* the question of beneficial title, the court in *Von Clemm* v. *Smith, supra,* and the Attorney General, demonstrated their misunderstanding of the nature of the burden of proof demanded by the Act. In directing petitioner to "prove a negative" as to non-existent and *totally unproven* activities as an alleged "agent" of the German government after outbreak of war, the court ignored §§ 3 and 16 of the Act. An alleged violation of the Act must be established in criminal proceedings (§§ 3 and 16 of the Act). The "national interest" here involved is to uphold the United States Constitution. The Attorney General's Order of Disallowance of March 22, 1971, is unjustified and should be reversed.

Summary of Reasons for Granting Writ of Certiorari.

These petitioners are entitled to a hearing at which the prevesting title to the seized merchandise will be determined. A resident-citizen claimant, not convicted of a violation of the Act during wartime, is a non-enemy within the law. This Court should so confirm. Both *Alley* v. *Clark* and *Von Clemm* v. *Smith* lack the finality of a just decision. The Act must be read as a whole. The Trading with the Enemy Act is a "makeshift patchwork" (Justice Frank-

furter, in *Guessefeldt* v. *McGrath*, 342 U.S. 308, 318, 319 (1952), but it is essentially considerate of the rights of individuals affected.

The property concerned in these proceedings was in the United States prior to December 18, 1941. It was entered on the books of petitioners' firms. Ascertainment of title under the purview of Executive Order No. 9095 thus becomes necessary.

By claiming lack of subject matter jurisdiction, the lower courts have avoided ruling on the serious constitutional, legal and moral issues which this case presents. While this Honorable Court will not ordinarily review the concurrent findings of the lower courts, elementary justice requires intervention in this instance. As the Chief Hearing Examiner emphasized in his Recommended Decision (1959 Rec. Dec. p. 165):

"In reply Von Clemm aptly asserts:

> "In seeking to make Von Clemm appear a 'stooge of the Nazis', the Claims Branch might as well claim that the American automobile operator is a 'stooge of the Bureau of Motor Vehicles'. Here, as there, the power of license is separate and distinct from operation and ownership. Certainly, the existence of 'Export Control Programs' in England does not make the American importer of English woolens or Scotch whiskey a creature of the British. Neither did the existence of such controls in Germany make Clemm a creature of the Germans."

The Chief Hearing Examiner concluded:

> "The record does not support the Claims Section's view that these transactions were tantamount to overt acts in carrying out a sinister conspiracy between Von Clemm and the Reichswirtschaft-Ministerium, Imico, and other German entities against the peace and se-

curity of the United States. When analysed objectively, they appear as ordinary legitimate commercial transactions. They could appear as sinister only when viewed through glasses of war time emotion."

The conceded legal errors, the vagueness of the statute, and the obvious *misinterpretation* of it by the judges in the lower courts, call for *reassessment* of the conclusions reached. The Lemberg evidence, *supra*, p. 40, before the Attorney General since 1966, *supports* the findings of the Chief Hearing Examiner, *supra*, p. 5, to the effect that no violation of a "freezing order" took place in 1940, in that the diamond shipment then entered through Customs was *not Belgian*, but German, as declared.

The Lemberg evidence *demonstrates* that petitioner Von Clemm's conviction, *United States* v. *Von Clemm*, *supra*, p. 4, was a miscarriage of justice, a fact which in itself would seem to constitute sufficient grounds for remanding this case to the lower courts for reappraisal.

The Attorney General's Order of Disallowance of March 22, 1971, has put petitioners on par with the convicted traitors *Best*, *Sarthou* (*Von Neindorff*) and *Hausen*, *supra*, p. 19, and has thus branded petitioners, although totally loyal to this country, forever as traitors to their country. And yet, in a moment of unemotional candor, the court in *Von Clemm* v. *Smith*, *supra*, conceded: "The Act does not define the word 'agent' . . . no case exactly similar to this one has heretofore arisen."

Respectfully submitted,

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APPENDIX A.

Constitutional and Statutory Provisions Involved.

Amendment V to the United States Constitution in pertinent part provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 32(a) of the Act, in pertinent part, provides:

"The President, or such officer or agency as he may designate, may return any property . . . or the net proceeds thereof, whenever the President or such officer or agency shall determine —

> that the person who has filed a notice of claim for return . . . was the owner . . . prior to its vesting, (32(a)(1));
> that such owner . . . (is) a citizen of the United States (or a persecutee), (32(a)(2)(C)(D));
> that the property . . . claimed . . . was not . . . held . . . pursuant to any arrangement to conceal . . . (32(a)(3));
> that the Alien Property Custodian has no actual or potential liability under the Renegotiation Act . . . (32(a)(4));
> that such return is in the interest of the United States. (32(a)(5))."

APPENDIX B.

United States Court of Appeals

For the First Circuit

No. 74-1036

WERNER C. VON CLEMM, et al.,

PLAINTIFFS, APPELLANTS,

v.

ROMAN ACOSTA BANUELOS, et al.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Charles B. Swartwood, III, with whom *Mountain, Dearborn & Whiting* was on brief, for appellants.

Bruno A. Ristau, Attorney, Department of Justice, with whom *Irving Jaffe*, Acting Assistant Attorney General, *James N. Gabriel*, United States Attorney, and *Morton Hollander*, Attorney, Department of Justice, were on brief, for appellees.

June 3, 1974

COFFIN, *Chief Judge*. Appellant began his long and arduous relationship with the Alien Property Custodian and the federal judicial system in the year 1941.[1] Since that

[1] Von Clemm and Alley, as trustee for Von Clemm's children formed a partnership in 1941, Bridge Imports. Von Clemm was the 75% general partner and Alley was, as trustee, a 25% special partner. Bridge was a partial owner of Pioneer. The appeal brief has not differentiated their interests. We note, however, that Alley sued the Attorney General in federal court under § 9(a) seeking return of the property in his capacity of limited partner in Bridge. The relationship between Bridge and Pioneer is fully explained in *Von Clemm* v. *Smith*, 255 F. Supp. 253, 361 (S.D. N.Y. 1965). The court dismissed the action on the grounds that

time his case has been scrutinized by judges and administrators at epic length. It falls to us to decide whether he has received the consideration which is his due or whether another round of judicial examination is called for. We hold that review of the administrative decision under Section 32 of the Trading with the Enemy Act (the Act), 50 U.S.C. App. § 1 *et seq.* is foreclosed to the appellant; the district court properly dismissed the complaint.

Through all these years appellant's objective has been to recoup the value of seized itmes which included six packages of diamonds and two hundred seventy packages of synthetic and semi-precious stones, sold by the Alien Property Custodian, sometime subsequent to their vesting in 1945, for well over one million dollars.[2]

The history of appellant's business transactions is complex. It is set forth in *Von Clemm* v. *Smith,* 255 F. Supp. 353 (1965). For our purposes it is sufficient to note that, in 1938, appellant, an American citizen born in Germany, undertook to import jewels and other items from Europe under the corporate name Pioneer. He made partial payment in blocked marks which could be obtained at a discount. This commercial enterprise was potentially limited by the Presidential freezing orders of April and May 1940. Executive Order 8389 regulated trade with countries which had been overrun by German armed forces including Denmark, Norway and the Low Countries. Appellant's trade in Belgian and Dutch diamonds was threatened, but, without obtaining the requisite treasury licenses, he arranged a complicated subterfuge for importing the diamonds

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under New York law a limited partner has no property rights in partnership assets and Alley had no standing to sue. *Alley* v. *Clark,* 71 F. Supp. 521 (E.D. N.Y. 1947).

[2] The property was vested in the Alien Property Custodian between 1942 and 1945 by vesting orders numbered 352, 353, 354, 4754, 4755 and 7611. The complaint alleges these properties were liquidated for a sum in excess of $1,300,000.

through Germany. There was persuasive evidence that these transactions, prior to the outbreak of war, involved close contact with and approval by the German government, and indeed that they were for the benefit of that government. *See* 255 F. Supp. at 362-363. One of the diamond shipments, arranged through intermediaries, cleared customs. This transaction led to appellant's prosecution and conviction for conspiracy to import under a false declaration that the diamonds were of German origin, in violation of the freezing orders and therefore of the Act, and of 12 U.S.C. § 95, *affirmed* in *United States* v. *Von Clemm,* 136 F.2d 968 (2d Cir.), *cert. denied,* 320 U.S. 769 (1943). Other shipments similarly arranged were seized by customs and are the crux of this suit.

Upon the finding by the Custodian that the property was owned beneficially or directly by enemy nationals, the property was seized and vested as authorized by the Trading with the Enemy Act, 50 U.S.C. § 5. The Act itself established the means to appeal such a determination. The routes provided for appeal are alternative routes. One or the other (but not both) is available to each claimant.[3] Section 9(a) of the Act provides that anyone not an "enemy" as defined therein may seek administrative return of the property and sue in equity in a federal district court. Section 32(a) indicates that for those ineligible for Section 9(a) relief there is exclusive administrative recourse.[4]

In 1959, after a denial of return of proceeds by a hearing examiner for the Office of Alien Property, appellant filed

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[3] *Legerlotz* v. *Rogers,* 266 F.2d 457, 459 (D.C. Cir. 1959); *McGrath* v. *Zander,* 177 F.2d 649, 652 (D.C. Cir. 1949).

[4] Section 32(a) was enacted subsequent to the major portions of the Act, and was intended to permit the Attorney General at his discretion to obviate injustices that might result. For analysis of the statute, *see Schilling* v. *Rogers,* 363 U.S. 666, 674-75 (1960); *McGrath* v. *Zander,* 177 F.2d at 652.

suit for return of the property under Section 9(a).[5] The statutory scheme implicitly requires that the court determine de novo controverted issues. The liminal issue, upon which appellant's right to § 9(a) relief depended was whether or not he was an "enemy" or an "ally of an enemy" under the Act.[6] The district court held a six week trial, directed, in part, toward resolution of this dispute. Appellant was affirmatively shown to have been an agent of the German government until the outbreak of hostilities. The court concluded that in light of his prior conduct, and, in its view, appellant's failure to show that he had discontinued his relationship with the German government after the outbreak of war, he had failed to prove that he was not an agent of an enemy for purposes of the Act.[7] Under § 9(a) recourse to judicial remedy is limited to those not "enemies" or "allies of an enemy". The court, therefore, dismissed the action for want of jurisdiction. *Von Clemm* v. *Smith,* 255 F. Supp. 353 (S.D.

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[5] Section 9(a) provides that: "Any person not an enemy or ally of an enemy claiming an interest, right or title in any money or other property which may have been conveyed . . . or paid to the Alien Property Custodian or seized by him hereunder and held by him . . . may file with the said custodian a notice of his claim under oath . . . and the President . . . may order the payment . . . or delivery to said claimant . . . If the President shall not so order . . . said claimant may institute suit in equity . . . in the district court of the United States . . . to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment . . . or delivery to said claimant . . . ."

[6] When seeking recovery of seized property under the Act the petitioner has the burden of showing himself not to be an "enemy" or "ally of an enemy" within the meaning of the Act. *Societe Internationale* v. *Rogers,* 357 U.S. 197, 212 (1958); *Manufacturers Trust Co.* v. *Rogers,* 291 F.2d 461, 462 (2d Cir. 1961).

[7] The court couched its findings in terms of failure of proof. Nevertheless, in order to rule that appellant was ineligible for § 9(a) treatment, the court must necessarily have found that he was an "ally of an enemy" for purposes of the Act. *See Von Clemm* v. *Smith,* 353 F. Supp. at 355-356, 367, 369.

N.Y. 1965), *aff'd*, 363 F.2d 19 (2d Cir. 1966), *cert. denied*, 385 U.S. 975 (1966).

Appellant then pursued the route left open to those not qualified for § 9(a) relief. He pursued administrative appeals until March 22, 1971 when the Attorney General issued an order disallowing the claim as "not in the interest of the United States". Within the meaning of § 32(a)(5) of the Act, this last avenue led appellant to this court where he seeks to appeal the administrator's determination. The district court dismissed the complaint for want of subject matter jurisdiction. The court reasoned that Section 7(c) of the Act[8] limits judicial review to claims filed pursuant to Section 9(a). Since, by judicial decision, appellant was eligible only for § 32(a) relief, he had no basis for seeking judicial review of the exclusive administrative determination. The finality and exclusivity of administrative relief provided by Section 32(a) has been confirmed in *Schilling* v. *Rogers*, 363 U.S. 666 (1960), which held this limitation on judicial review to be constitutional.[9]

Appellant argues that *Schilling* dealt only with the

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[8] Section 7(c) of the Act provides: "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter . . . transferred . . . to the Alien Property Custodian . . . shall be that provided by the terms of the Act . . . ."

[9] In *Schilling* an alien filed a claim under § 32(a) for return of property, the claim was denied and the alien sought judicial review of a question of law: whether he was excluded under the Act from *all* relief. The Supreme Court held that § 7(c) of the Act precluded judicial review of the administrative disposition. The court also held that the Administrative Procedure Act was not applicable because by its terms no judicial review is afforded where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." The court found the § 7(c) of the Act invokes both limitations: "[T]he Trading with the Enemy Act excludes a judicial remedy in this instance, and that . . . because of this, as well as because of the discretionary character of the administrative action involved, the Administrative Procedure Act, by its own terms, is unavailing to the petitioner." *Schilling, supra*, 363 U.S. at 676.

rights of enemy nationals, not entitled to Fifth Amendment protections. As a citizen, appellant claims that his right to an adjudication of his property rights cannot be diminished by imposing on him the burden of proving that he was not an "ally of an enemy" under § 9(a), or denied entirely through unreviewable administrative action, under § 32(a). Having been subjected to the "impermissible burden" in his earlier § 9(a) court suit, he claims that a judicial forum for consideration of his constitutional claim must lie in review of the § 32(a) determination.

Past Court pronouncements may perhaps be read as giving a constitutional bill of health to § 9(a) by approving the availability to a nonenemy claimant of a later judicial hearing on the propriety of a seizure. *See, e.g., Societe Internationale* v. *Rogers,* 357 U.S. 197, 211 (1958); *Stoehr* v. *Wallace,* 255 U.S. 239, 245-246 (1921). But in none of such cases were the status of the claimant and the claimant's burden to establish his nonenemy status in issue.

Assuming, without conceding, that appellant's claim is not foreclosed by prior cases, we examine it. Since Congress has demonstrated its intent to foreclose judicial review of the administrative decison under § 32(a), a holding that such review is constitutionally required would have to be predicated on a finding that the present statutory scheme is fatally defective. Appellant claims that the taking of his property must be accompanied by the highest due process safeguard, judicial process. The most extensive judicial scrutiny includes determination of "jurisdictional" or "constitutional facts".[10] Here the essential

[10] *E.g., Crowell* v. *Benson,* 285 U.S. 22, 54 (1932); *Ng Fung Ho* v. *White,* 259 U.S. 276, 285-286 (1922); *see also St. Joseph Stock Yard Co.* v. *United States,* 298 U.S. 38, 84 (1936); *Ohio Valley Water Co.* v. *Ben Avon Borough,* 352 U.S. 287 (1920); Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts,* 66 Harv. L. Rev. 1362 (1953).

fact is whether appellant was an "enemy" or "ally of an enemy" under the Act. Section 9(a) provides not only for judicial determination of this fact but a de novo judicial hearing. Appellant had the explicit opportunity to establish his status. He had the implicit opportunity to challenge the constitutionality of the burden of proof. The fact that judicial relief was made available before rather than after administrative jurisdiction was assumed is not determinative. *See Yakus* v. *United States,* 321 U.S. 414 (1944). "There isn't often a constitutional right to a second bite at the apple." *The Power of Congress to Limit the Jurisdiction of the Federal Courts,* 66 Harv. L. Rev. at 1369. The scheme itself provides all the requisite constitutional safeguards. That opportunity was not earlier seized to obtain a judicial ruling on appellant's constitutional assault on the proper burden of proof under § 9(a) does not provide any basis for avoiding the ruling in *Schilling* that § 32(a) relief is exclusively administrative and judicial review is foreclosed. The court below therefore properly ruled that it was without subject matter jurisdiction to review the claim.

We too are without jurisdiction to determine whether the district court in the Section 9(a) suit improperly required Von Clemm to bear an affirmative burden of proof.[11] We note, however, that even if we had jurisdiction to consider its legal merits, appellant's claim, since it could have been presented to the second circuit on appeal from *Von Clemm* v. *Smith, supra,* would be barred by res judicata. The Court's statement a century ago is valid today:

> "[J]udgment, rendered upon the merits, constitutes an absolute bar to subsequent action. It is a finality

[11] While we do not reach this claim, we think it may be weakened by the Supreme Court's holding in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, —— U.S. ——, 42 U.S.L.W. 4693, 4701 (May 15, 1974).

> . . . concluding parties . . . not only as to every matter which was offered and received to sustain or defeat the claim . . . but as to any other admissible matter which might have been offered . . . Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever." *Cromwell* v. *County of Sac,* 94 U.S. 351, 352-353 (1876).

The policies underlying the doctrine are well illustrated by this case. At some point litigation must terminate.

The order of the District Court is affirmed.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

DOCKET NO. 183 APPENDIX "C"

BEFORE THE DIRECTOR

OFFICE OF ALIEN PROPERTY

UNITED STATES DEPARTMENT OF JUSTICE

Description of Evidence Before the Director.

1. Office Memorandum of the United States Government,
Dated November 18, 1944
TO: Mr. Tom C. Clark, Assistant Attorney General,
FROM: John Edgar Hoover, Federal Bureau of Investigation,
SUBJECT: Werner Conrad Von Clemm, with aliases.

The memorandum here cited is in the possession of the Attorney General. It originated as follows:

In order to help his brother Werner to clear himself from his war-time conviction, United States v. Von Clemm, 136 F 2d 968 (2nd Cir.) cert.denied, 320 U.S. 769 (1943), Carl von Clemm, a German citizen, called on the American Embassy in Lisbon in 1944 although the United States and Germany were at war. He there delivered the documents which the Federal Bureau of Investigation forwarded, with the office memorandum here cited, on November 18, 1944, to the Honorable Tom C. Clark, then Assistant Attorney General in charge of the Criminal Division of the Justice Department.

The Attorney for the Claims Section, in his affidavit of January 1969, executed in connection with his appearance before the U.S.District Court, Southern District of New York in United States v. Von Clemm et al C. 11253, described the FBI-submitted evidence as follows:

> "The files of the Department of Justice indicate that on November 18, 1944, the Federal Bureau of Investigation transmitted to the Criminal Division of the Justice Department three dispatches, containing more than 180 pages, which contained papers which the covering memorandum of the F. B.I. states were recently received by the F.B.I. from Carl von Clemm who submitted them in order to clear his brother's name."

The 180 pages of documents are part of the record before the Attorney General in the present suit. A duplicate set of the documents was examined by the Chief Hearing Examiner of the Office of Alien Property who concluded (1959 Recommended Decision, Office of Alien Property, Docket 183, p. 167):

> "Von Clemm offered and there was received in evidence in this proceeding photostats of all the correspondence and shipping documents of all three diamond shipments. These consist of the memoranda from Pfandleihanstalt to Diamant-Kontor, from Diamant-Kontor to PEA (Preliminary Examination Agency) Idar-Oberstein, from PEA to the diamond cutters, from the diamond cutters to PEA, from PEA back to Diamant-Kontor, from Diamant-Kontor

back to Pfandleih, thence to Imico and from Imico to Pioneer. These documents establish beyond any doubt that all these diamonds were cut in Germany and that none came from either Belgium or Holland after these countries were overrun by the German army on May 10, 1940.

The shipping documents also establish that the second and third shipments were not on consignment but were offered as purchased merchandise to Pioneer. Title therefore passed to Pioneer upon arrival of the goods at the post office."
(Underscoring ours.)

2. Testimony of Government Witness Tidemann Ulrich Lemberg, given in January 1963 before American Consul in Hamburg, Germany and Revocation of Said Testimony on June 15, 1966.

The FBI-submitted documents, supra, were not considered by Judge McLean in his decision, 255 F. Supp. 353, 362,363 (1965). The judge, in finding the three diamond shipments of Belgian origin, relied entirely on the testimony of the government's witness Tidemann Ulrich Lemberg (Lemberg).(*)

FOOTNOTE(*): Judge McLean stated (255 F.Supp.353, 362,363):

"The evidence establishes beyond question that the program recommended by Cremer was carried out. Major Lemberg testified that Imico was the 'decisive agency through which exports to America were channeled', and that 'the export transactions of Imico to the United States were not carried out in its own name, but as a commercial agency for the German

Lemberg's testimony was given in the form of a deposition before the American Consul in Hamburg in January 1963. Lemberg revoked his Hamburg testimony in a letter which he addressed to the Chief of the Foreign Litigation Unit of the Department of Justice, Mr. Bruno A. Ristau, on June 15, 1966, accompanied by an Audit Report in Flemish, dated October 23, 1941, which Lemberg had misinterpreted. (See Appendix, C-a and C-b.)

(Footnote (*) page 3, continued)

Government Agency'. He also testified that between October 26, 1940 and early February 1941, six packages of diamonds were sent from Belgium to Berlin pursuant to this plan. . ."

". . . The second shipment, of two packages, and the third, of four packages, covered by invoices from Imico to Pioneer dated respectively December 4, 1940 and February 17, 1941, were detained by the U.S.Customs upon their arrival in this country and were never delivered to Pioneer. These are the packages which were eventually vested by Vesting Order No. 4755 on March 14, 1945 and which were ultimately sold by the Alien Property Custodian."

"The evidence satisfies me and I so find that these diamonds were of Belgian origin, that they were sent through Imico to Von Clemm pursuant to the German Government's plan heretofore outlined, and that von Clemm knew this to be true."

Lemberg's corrective statement arrived too late for the trial, Von Clemm v. Smith, 255 F.Supp. 353 (1965). Judge McLean denied a motion to re-open the trial on its strength. (Law Journal, December 6, 1966).

The Lemberg June 15, 1966 letter, subsequently sworn to before John H. Ward, American Consul in Hamburg, Germany, on October 15, 1969 (Appendix, C-c), demonstrates that whatever program was conceived by Cremer in late 1940 to aid the Belgian diamond industry in reestablishing contact with their American clientele, was not carried out:

The Flemish Audit Report which Major Lemberg, Cremer's superior, found in his files, and which he placed before the Chief of the Litigation Section with his June 15, 1966 letter, lists the six packages of diamonds in regard to which he had testified at the time he was deposed before the American consul in Hamburg in January 1963. The six packages add up to a total of 278.32 carats. In its decision the court (255 F.Supp. 353) equated these six packages with the six packages which Imico, Berlin, shipped to Pioneer,

New York, early in 1941, in two registered first class mail letters, known as Diamond Shipment II and Diamond Shipment III (Pl.Ex. 110A, 111A). These shipments had a combined weight of 1211.08 carats. A comparison of the carat weights demonstrates that there is no relationship between the six allegedly Belgian packages and the actual German shipments.

3. Government Exhibits, Cl.Br.Ex.340 and 341, in Evidence before the Attorney General, Demonstrate that Belgian Shipments Were Not Approved.

Documents introduced by the government in the Administrative Proceedings under Sections 9 and 32 of the Act demonstrate that deals concerning diamonds of Belgian origin were not approved by the German Military Government in Belgium:

> "The Supreme Field Command in Belgium demands removal in toto of the foreign exchange accruing in this business to Belgium," hence, "There is no German interest in the export of these stones," hence, "This business was not approved by the compentent official agencies." (Cl.Br. Ex. 340, Imico's letter of January 28, 1941 to Reichs Economic Minister.)

> "Imico diamond export deals being effected with approval Reich Economic Ministry; in view of special manner of execution easing of terms of payment were granted American purchasers as Exception. Deals concerning diamonds of Belgian

origin were not approved." (C.Br.Ex. 341, cable from German Foreign Office to German Consulate in Chicago.) (Underscoring ours.)(*)

4. The Discrepancy in the Carat Weights Proves the Court's Error:

The origin of the three diamond shipments made to Pioneer by Imico, the German exporter, was painstakingly examined before the Administrative Tribunal on the strength of the tangible evidence transmitted by the FBI, supra. That evidence,

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FOOTNOTE(*): Von Clemm never had any contact with the German Military Government in Belgium, or any of its employees, until he met Major Lemberg in the American Consulate in Hamburg in January 1963, almost 18 years after cessation of hostilities. (Cremer was a civilian businessman.) Von Clemm never represented the German government, whether in Germany or in Belgium, nor did he seek such representation. He tried to help refugee Belgian diamond dealers who came to his office in New York in the 1940-41 period, in reestablishing contacts with their correspondents in Antwerp, but no deal in Belgian diamonds ever materialized. His sole sources of information regarding Belgium were the New York Times and Belgian refugees who visited him. Von Clemm tried to help such people, as the United States was not at war. (Cremer's contemplated shipping program was moreover businesslike, and unrelated to war. It differed not from similar efforts on the part of the American Military Government in Germany to help German industry to its feet after the defeat of Germany.)

described by the government's attorney, supra, is unequivocal. It formed the basis for a positive finding of German origin of the diamonds imported by Pioneer by the then Chief Hearing Examiner of the Bureau in April 1959. (Recommended Decision, pp. 165-167, supra.)

Pioneer's books demonstrate the following FOB European port values for the three diamond purchases:

Shipment	Invoice Date	Pieces	Carat	Invoice Value
Diamond I	June 1940	7766	539.15	$ 44,169.82
Diamond II (in two packages)	Dec. 1940	9635	499.87	$50,836.50
Diamond III (in four packages)	Feb. 1941	9894	711.21	70,891.00
			1211.08	

Judge McLean's equation was plainly erroneous.

The Lemberg document here annexed proves that the figure "6" which derived from the fact that Pioneer's second and third diamond importations were contained in six packages shipped in two registered letters, has no connection with the figure "6" mentioned by witness Lemberg in his testimony.

Aside from the lack of relationship on the basis of weights, witness Lemberg in his admission of error confirms that the document he introduced was wrongly interpreted by him. The six Belgian packages, totaling 278.32 carats, of which the Flemish document speaks, never left Antwerp: they remained there.

5. Testimony of Belgian Diamond Dealers before Judge McLean, 255 F.Supp. 353 (1965), Transcript of Record, pp.2220 to 2224, Do Not Support the Government's Contentions.

The trial before Judge McLean in the summer of 1964 (255 F.Supp. 353) produced no evidence other than the Lemberg testimony purporting to indicate that dealings in diamonds owned by Belgian merchants took place between Imico, Berlin, and Pioneer, New York, in the 1940-41 period. No Belgian merchant has come forward in 30 years to lay claim to any such alleged shipments.

That no Belgian shipments took place was brought out before the McLean court through the very witnesses the government introduced (Tr. 2220 to 2224). At pages 2222, 2223 the following coloquy

developed between the government's witness Herman Elkon, refugee diamond dealer, and petitioner's attorney:

Q. (by Mr. Wax, Von Clemm's attorney): Did you ever see Mr. Werner Von Clemm before, Mr. Elkon. . .?

A. I saw him at the first trial. . .

Q. Did you see him before the first trial?

A. No.

Q. Did he ever call you on the telephone?

A. No.

Q. Did he ever offer you any diamonds?

A. No.

Q. Did you ever receive a communication from Pioneer Import Corporation?

A. I don't think so.

Q. Did you ever receive a communication from Bridge Import Company?

A. I don't think so.

Q. Did anybody representing them ever make any contact with you?

A. I don't think so.

Q. Did anybody representing them ever offer to sell you any diamonds?

A. I don't think so.

Q. Did you ever receive any diamonds pursuant to that letter (the Lemberg-Cremer program for restarting Belgian exports via Imico, Berlin)?

A. No.

Q. Did you ever hear of any diamonds ever being sold pursuant to that letter?

A. No.

The other government witness, diamond dealer Paul Klein, in all respects confirmed the Elkon testimony. But for Lemberg's error in interpreting a vitally important document, Judge McLean could not have concluded that the diamonds Pioneer imported were of Belgian origin.

Appendix C-a.

Letter of Tidemann Ulrich Lemberg, Certified Public Accountant, Tax Consultant of Hamburg, Germany, dated June 15, 1966, addressed to Mr. Bill G. Andrews, Esq., Shearman & Sterling, 20 Exchange Place, New York, N.Y. 10005; Mr. Bruno A. Ristau, Esq., Attorney, Department of Justice, Washington, D.C. 20530 (English translation).

Tidemann Ulrich Lemberg Wirtschaftspruefer Steuerberater
(Certified Public Accountant)(Tax Consultant)

Mr. Bill G. Andrews Esq.
Shearman & Sterling

20 Exchange Place
New York, N.Y. 10005

Mr. Bruno A. Ristau Esq.
Attorney Department of Justice

Washington D.C. 20530

2 Hamburg 1, Lilienstrasse 36
June 15, 1966 Klbg/Iv

Re: Werner C. von Clemm vs. Attorney General of the United States;
Civil Action No. 60-2698 of January 29, 1963
-Deposition of Tidemann Ulrich Lemberg-

Gentlemen,

I, the undersigned Tidemann Ulrich Lemberg, testified before the Vice-Consul of the United States of America (Commissioner) in the American Consulate in Hamburg on January 29, 1963, to the following:

1 That diamonds were sent from Belgium to Berlin before February 6, 1941 (aaO S. 9) (p. 9).

("I can only say that prior to February 6, 1941, diamonds were sent from Belgium to Berlin" - aO S. 9-) (p. 9).

("that six packages of cut diamonds had been sent from Belgium to the German governmental office prior to February 6th, 1941"), (aaO S. 10) (p. 10).

2 That these diamonds were sent in six packages (aaO S.9 (p.9)).

("I recently looked into them (my papers). . ." and found that it was six packages that were thus sent. I had not had it in my memory at that time", aaO S. 9)(p.9).

3 - upon further questioning - That the facts as enumerated above were contained in the first report of the Belgian corporation (self-administering body) ("Diamantkontrole") which (report) was made known to me in my then capacity as Military Government Administration Counseller in Belgium.

("Referring to Papers") "I have a listing here in my file". aaO S.')(p.8).

("It was in the first report of that Belgian official that the fact was stated that six packages of cut diamonds had been sent to the German governmental office prior to February 6, 1941, aaO S. 10 (p.10)).

I, the undersigned Tidemann Ulrich Lemberg, after renewed examination of the documents to which my then deposition referred, am obliged to declare that I erred and that they (the documents) do not show that any diamonds at all were sent to Germany before February 6, 1941, nor that there were six packages involved which were sent to Germany.

On the occasion of my deposition of January 29, 1963, I had with me the document on which my error is based and which I correct with this declaration. I was however, not permitted to go back to this document, in fact, I was expressly asked to give my deposition from my memory (compare page 8 and 9). I thereupon made my deposition from memory stating explicitly that I indirectly referred to the document before me however, as I had perused it a short time before my testimony (aaO S.9)(p.9).

In my previous reading of the document - and consequently in giving the deposition itself - I however acted in error. What happened was that I misunderstood a notation in the document which was given in the Flemish language. My erroneous interpretation of the respective notation became the basis of my incorrect deposition; this because during my deposition I was not permitted to once more look at the report which was lying before me. Had I been able to check my papers in conjunction with the questions posed to me in the direct examination and in the cross-examination I would perhaps have caught my error, viz., my misinterpretation of a certain notation in the report.

I must state after renewed study of the document which was then available to me and which was the basis of my deposition - and which I have now had occasion to once more check - that it does <u>not</u> show that any diamonds at all were sent to Germany before February 6, 1941 (the day of the inauguration of the system of the so-called "Diamantkontrole").

I felt the urge to once more check the documents on which my deposition was based after learning of the judgment of the U.S. District Court of November 23, 1963, which showed me that in their result erroneous conclusions were drawn from my deposition. Regarding the actual diamond shipments sent to U.S.A. and mentioned in the judgment, I moreover never testified in my deposition - lacking knowledge pertaining thereto.

In again checking the document my error at the time became exposed. The document which then as now is before me does not reveal anything regarding six packages of any kind which were sent to Germany before February 6, 1941. I herewith hand over in photo-copy this document on which my error is based and I declare my willingness to submit it in the original at any time.

True, six sealed packages with cut goods are specifically listed in this document. There is also something mentioned at one point of a "shipment to Germany", so that it becomes understandable how my error in reading a document more than 20 years old before my deposition of January 29, 1963, came about. This notation refers however, as only now becomes clear to me after more careful examination, not to the mentioned six packages but to a seventh package which was "sent back to Germany". The six packages, on the other hand, were at the time of the report (October 23, 1941) still in Belgium. This follows from the "balance" ("Saldo") shown on page 2 of the compilation of W. Frensel under "sundry" ("Diversen").

In carefully checking the entry which caused my error, it is found that W. Frensel gives under date of February 6, 1941 as his opening inventory the mentioned six packages plus 1 package of diamonds and then states that the 7th package was sent back to Germany. However, the six packages which are listed, W. Frensel must still have had in his inventory at the time of his accounting (October 23, 1941) - contrary to my deposition. For, on page 2 of his accounting covering "Geslepen Sierad (Sierrad) Diamanten" these six packages are still shown as "balance" ("Saldo"). (See enclosure).

I am making this statement in the firm realization that I - from memory - drew the wrong conclusions from the (Frensel) accounting report, in re-reading it after more than 20 years before my deposition of January 29, 1963, and that I testified regarding facts which demonstrate themselves as non-existent after renewed examination. Thus my deposition of January 29, 1963 in the light of the document before me of which I submit photo-copy, proves itself as non-objective (and) as not corresponding to the facts in regard to the six packages of diamonds (supposedly) sent to Germany before February 6, 1941.

/signed, T.U. Lemberg

(Tidemann Ulrich Lemberg)

Appendix C-b.

Audit Report in the Flemish language (with English translation), prepared for the Belgian Secretary General of the Ministry of Economic Affairs concerning the Diamond Control, dated October 23, 1941, to which the Lemberg letter of June 15, 1966, refers. The Audit Report bears the case number 60 Civ. 2696 and the Receipt Stamp of the U.S. District Court, S.D. N.Y., showing the date of receipt as November 10, 1966.

60 Civ 2696

U.S. DISTRICT COURT FILED NOV 10 1960 S.D. of N.Y.

S P E C I A A L V E R S L A G

VOOR DEN HEER DR. VICTOR L E E M A N S,

SECRETARIS-GENERAAL

VAN HET

MINISTERIE VAN ECONOMISCHE ZAKEN

AANGAANDE DE

D I A M A N T C O N T R O L E

- 1 -

(Translation)

S P E C I A L R E P O R T

FOR MR. DR. VICTOR LEEMANS,

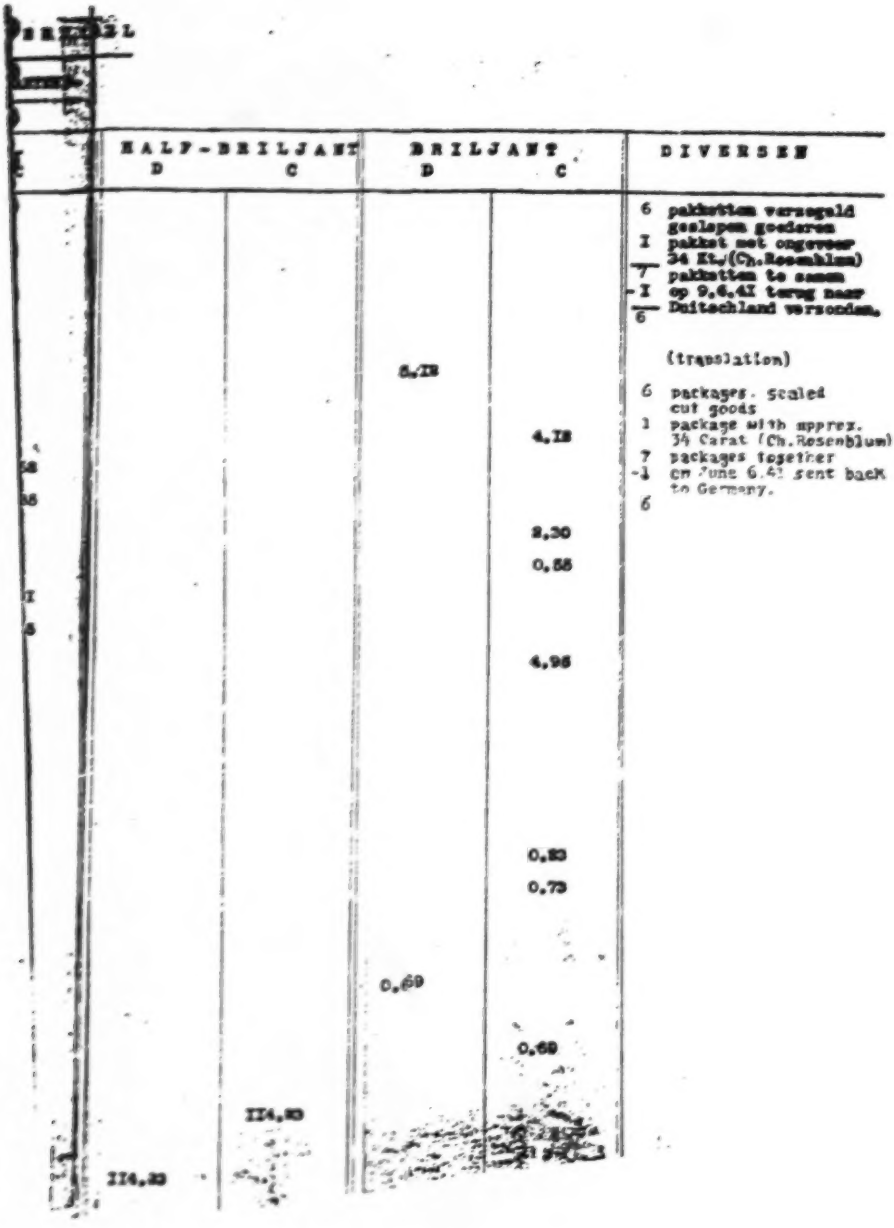
SECRETARY GENERAL
OF THE
MINISTRY OF ECONOMIC AFFAIRS

CONCERNING THE

D I A M O N D C O N T R O L

Antwerpen, 23 Oktober 1941.

1941 (translation)		8/8 D (Debit)	8/8 C (Credit)
8/8	Stockopgave		
Feb. 6 41	(Opening Inventory)		
"	Stockopgave	8,ID (Karat)	
"	"		
26/2	Fr. Van Elsen		8,ID
"	"		
31/2	G. Brengelmans		
9/5	"		
10/6	P. Kuyte		
24/6	G. Brengelmans		
27/6	K. Timmermans		I2,48
1/7	"		
"	O. Daniels		
10/7	"		0.56
9/8	Bijgevoegde stockopgave (Enclosed Opening Inventory)	243,97	
25/7	Opgave (Report)	2,38	
29/7	Mertens, Mariaburg		9,96
"	K. Timmermans		2,38
"	O. Daniels		
30/7	A. Neuman		
"	Opgave	I0,92	
8/8	"	I,84	
"	"		
"	K. Timmermans		I,84
"	O. Daniels		
I2/8	Fr. Timmermans		4,06
"	Fr. Van Elsen		
21/8	Opgave	4,06	
"	" (Leop. Sternberg)		
"	" (Stockmann-Isaiefeld)	73,36	
3/9	O. Daniels		



	HALF-BRILJANT D	HALF-BRILJANT C	BRILJANT D	BRILJANT C	DIVERSEN
					6 pakketten verzegeld geslopen goederen
					I pakket met ongeveer 34 Kt.(Ch.Rosenblum)
					7 pakketten te samen
					-I op 9.6.41 terug naar
					6 Duitschland verzonden.
					(translation)
			8,IS		6 packages. Sealed cut goods
				4,I8	I package with apprex. 3/4 Carat (Ch.Rosenblum)
					7 packages together
					-I on June 9.41 sent back
					6 to Germany.
				2,30	
				0,55	
				4,96	
				0,83	
				0,73	
			0,69		
				0,69	
		II4,83			
	II4,83				

U. 7 2 2 7 5 2 4

1941		B	C	STASI C
6/9	Brief van 10/8/41	1,06		
*	id			
8/9	Gebr. Blokbank		73,99	
12/9	G. Breugelmans			
22/9	A. v.d. Linden		9,21	
*	L. Timmermans			1,85
24/9	H. Groesbeek		5,82	
0/9	Timmermans		11,96	
*	Borghans		14,47	
*	Timmermans			
1/10	R. Van Rixem			
3/10	Stoek	41,63		
7/10	A. Daniels			
11/10	J. Borghans		0,38	
		342,68	160,68	11,14
SALDO : (Balance)		330,97 (karat)		

SIRAAD DIAMETER...

TASIT C	HALF-BRILJANT B	HALF-BRILJANT C	BRILJANT D	BRILJANT E	DIVERSE
				27.82	
6.86					
				3.92	
				3.47	
				0.96	
				169.36	
			277.69		
				1.73	
				1.74	
14.34	134.85	134.89	28 .50	2..36	
3.29(karat)				39.06 /	16 pakhuisen (paviages)

Appendix C-c.

Affidavit of Tidemann Ulrich Lemberg of Hamburg, dated October 15, 1969, sworn to before John H. Ward, Vice Consul, United States of America, City of Hamburg, Federal Republic of Germany, American Consulate General, with attachments incorporated by reference, consisting of Lemberg's letter of June 15, 1966, and of the Audit Report of October 23, 1941, supra.

FEDERAL REPUBLIC OF GERMANY
STATE AND CITY OF
FREE AND HANSEATIC [illegible]
CONSULATE GENERAL OF THE UNITED STATES OF AMERICA

City of Hamburg,)
Federal Republic of Germany) ss.
American Consulate General)

Being first duly sworn, Till Hann Ulrich Lemberg of Hamburg deposes and says:

(1) that he has written and mailed the attached letter, dated June 15, 1966, and the document referred to therein on or about the date indicated therein to the addressees,

(2) that the contents thereof are true to his best knowledge and belief,

(3) that the attached letter and document are copies of the originals, and

(4) that the said copies are hereby incorporated herein by reference.

Sworn and subscribed
before me, this [illegible] day of October 1969

T. H. Lemberg

John K. Ward

Vice Consul, [illegible] of America.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-213

WERNER C. VON CLEMM, ET AL., PETITIONERS

v.

ROMANA ACOSTA BAÑUELOS, TREASURER OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the courts below erred in rejecting their challenge to the Attorney General's determination under the Trading with the Enemy Act that certain stones of German origin seized by the Alien Property Custodian in 1941 should not be returned to petitioners.

Petitioner Von Clemm brought suit in the United States District Court for the District of Massachusetts against the Treasurer and the Attorney General of the United States to compel the Attorney General to decide whether petitioner was the pre-vesting owner of certain property seized by the Alien Property Custodian during World War II as enemy property under the authority of the Trading

with the Enemy Act, 50 U.S.C. App. 1, *et seq.*[1] Petitioner also sought review of the Attorney General's determination under Section 32(a)(5) of the Act, 50 U.S.C. App. 32(a)(5), that a return of the vested properties to Von Clemm would not be in the national interest (App. 19).[2]

In 1943, Von Clemm filed an administrative claim with the Alien Property Custodian for the return of his property interests under Section 9(a) of the Act, and, after the 1946 addition of Section 32 to the Act (60 Stat. 50), he filed under that section too (App. 7). These administrative claims were consolidated with those of other parties who sought a return of the same vested properties, and were referred to a hearing examiner of the Office of Alien Property for a recommended decision (App. 16). Extensive hearings held in the mid-1950's on the consolidated claims resulted in a 1959 recommendation by the hearing examiner that the vested properties be returned to claimants other than petitioner Von Clemm (App. 17).

While these recommendations were awaiting review by the Director of the Office of Alien Property and the Attorney General, Von Clemm brought suit in the United States District Court for the Southern District of New York, seeking return of the vested properties under Section 9(a) of the Act. The suit, which raised *de novo* the questions previously considered by the hearing examiner (App. 7-8, 17), was dismissed after a protracted trial, the district court finding that Von Clemm was an "enemy" within the purview of the Act,

---

[1]Named as co-plaintiffs in the suit were Bridge Import Company, a partnership formed in 1941 under the laws of the state of New York, in which petitioner Von Clemm owns a 75 per cent interest and is a general partner, and Rayford W. Alley, a special partner, who holds the balance of the partnership interest as trustee under a declaration of trust for the benefit of Von Clemm's children. These parties will be collectively referred to as "Von Clemm."

[2]"App." refers to the appendix to petitioners' brief in the court of appeals.

and lacked standing to sue. *Von Clemm* v. *Smith*, 255 F. Supp. 353 (S.D. N.Y.), affirmed, 363 F.2d 19 (C.A. 2), certiorari denied, 385 U.S. 975.

Proceedings before the Office of Alien Property on the consolidated claims were suspended while petitioner's Section 9(a) suit was before the courts. In 1969, the Claims Section of the Office of Alien Property moved to dismiss Von Clemm's administrative claim under Section 32(a) of the Act on the ground that a return of the vested properties to him would not be "in the interest of the United States" within the meaning of Section 32(a)(5) of the Act (App. 8, 18). The "national interest" question was briefed and argued before the Office of Alien Property (App. 19), and the matter was submitted to the Attorney General for his determination, as required by the regulations of the Office of Alien Property (*ibid.*). On March 22, 1971, the Attorney General ruled that a return of the property to Von Clemm would not be in the interest of the United States and therefore disallowed Von Clemm's claims under Section 32(a)(5) of the Act (App. 8, 19). The present action seeks judicial review of that determination.

The district court dismissed the suit on the authority of *Schilling* v. *Rogers*, 363 U.S. 666, 671, 676, holding that the administrative relief available under Section 32 of the Act was committed entirely to the Executive's discretion, and that, in consequence, the court lacked subject matter jurisdiction to review the Attorney General's denial of administrative relief (App. 26-38; 365 F. Supp. 477).

The court of appeals affirmed (Pet. App. 53-60). After reviewing at length what it termed Von Clemm's "long and arduous relationship with the Alien Property Custodian" (*id.* at 53), and the issues that were litigated by the petitioner in the mid-1960's in the Second Circuit under Sec-

tion 9(a) of the Act (*id.* at 56-57), the court held that the earlier suit had made available to Von Clemm full judicial review of the propriety of the seizure of the property and his entitlement to its return (*id.* at 58-59). In concluding that under established legal principles the earlier decision barred re-litigation of all issues that were, or could have been, litigated, the court said (*id.* at 59-60):

> That opportunity was not earlier seized to obtain a judicial ruling on * * * [Von Clemm's] constitutional assault on the proper burden of proof under §9(a) does not provide any basis for avoiding the ruling in *Schilling* that §32(a) relief is exclusively administrative and judicial review is foreclosed. The court below therefore properly ruled that it was without subject matter jurisdiction to review the claim.
>
> We too are without jurisdiction to determine whether the district court in the Section 9(a) suit improperly required Von Clemm to bear an affirmative burden of proof. We note, however, that even if we had jurisdiction to consider its legal merits, * * * [Von Clemm's] claim, since it could have been presented to the second circuit on appeal from *Von Clemm* v. *Smith, supra,* would be barred by res judicata.* * *
>
> The policies underlying the doctrine are well illustrated by this case. At some point litigation must terminate.

The court of appeals' decision of the narrow issues here is correct. Section 7(c) of the Act, 50 U.S.C. App. 7(c), provides that "[t]he sole relief and remedy of any person having any claim to any money or other property * * * transferred * * * to the Alien Property Custodian * * * shall be that provided by the terms of this Act." The judicial remedy made available to persons like Von

Clemm is a suit under Section 9(a) of the Act, and Von Clemm availed himself of that remedy to its fullest extent. That a Section 9(a) suit affords a person constitutional protection is firmly established. *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211; *Stoehr* v. *Wallace*, 255 U.S. 239, 245-246. Von Clemm should not be allowed to relitigate issues that were raised, or could have been raised, in the earlier Section 9(a) suit. There is no occasion to consider departing from the holding in *Schilling* that judicial review of the Attorney General's administrative determination under Section 32 of the Act is unavailable.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11

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Supreme Court of the United States.

OCTOBER TERM, 1974

NO. 74-213

WERNER C. VON CLEMM ET AL.,
PETITIONERS

v.

ROMANA ACOSTA BANUELOS,
TREASURER OF THE UNITED STATES, ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY BRIEF

CHARLES B. SWARTWOOD III,
MOUNTAIN, DEARBORN & WHITING,
370 Main Street,
Worcester, Massachusetts 01608,
Attorneys for Petitioners.

Supreme Court of the United States.

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PETITIONERS' REPLY BRIEF

The Respondents assert in their November, 1974 *MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION* (p. 5):

> "That a Section 9 (a) suit affords a person constitutional protection is firmly established, *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211, *Stoehr* v *Wallace*, 255 U.S. 239,245-246."

The *Stoehr* case dealt with the question of whether the government had the right to sequester property in the first place. The Supreme Court ruled that it did and that executive seizures under the Act without prior judicial determination were within the war powers of Congress, *provided "adequate provision be made for a return in case of mistake"*.

That, and that only, is the essence of the opinion of the Supreme Court of the United States in *Stoehr* v. *Wallace* (supra). Mr. Justice Van Devanter, in summing up the court's opinion at pages 245, 246, stated:

> "That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be *enemy-owned, if adequate provision be made for a return in case of mistake,* is not debatable. (Citations) There is no warrant for saying that. . . ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts, but it does not make his action final." (Emphasis ours.)

At page 243, the Justice, citing from section 7(c) of the Act, as amended November 4, 1918, stressed the *relief provisions* of the Act. He stated:

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian. . . shall be that provided by the terms of this act. . . "
>
> "By section 12, as amended March 28, 1918, the Custodian is clothed with 'all of the powers of a common-law trustee' in respect of all enemy property coming into his hands and is given authority subject to the President's supervision, to manage and dispose of the same. . . as if he were the absolute owner. . . As respects the ultimate disposition of the property or its proceeds section 12 says: 'After the end of the war any claim. . . to. . . property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct.'"

At the time Mr. Justice Van Devanter rendered his decision in the Stoehr case, supra, *Section 32 had not yet been added to the Act.* Section 32 reinforces Petitioners' position in that it reaffirms the wording of Section 12, cited by Mr.

Justice Van Devanter (pp. 243-244):

> "After the end of the war any claim . . . to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."

Congress, to use the words of Mr. Justice Van Devanter, has made "adequate provision for a return in case of mistake". That fact was emphasized by Judge Lindley in *Kaku Nagano* v. *McGrath*, 187 F. 2d 759, where the Court said at p. 766:

> "The Supreme Court, itself, said in *Becker Steel Co.* v. *Cummings*, 296 U.S. 74, 79, 56 S. Ct. 18: 'The seizure and detention which the statute commands and the denial of any remedy except that afforded by section 9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the nonenemy owner either the return of his property or compensation for it.'"

The Supreme Court upheld Judge Lindley. It denied a writ of certiorari to the government.

The decision in the *Stoehr* case confirms that the Attorney General is under statutory and constitutional obligations to rule on the question of title.

In *Societe*, supra, the Supreme Court expressly held (p. 211):

> "Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned *is rescued from constitutional invalidity* under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act *which afford a nonenemy claimant a later judicial hearing as to the propriety of the seizure* (citations)." (Emphasis ours.)

It is clear that the "constitutional protection" to which Respondents refer concerns claimants' ultimate right to be heard "on the propriety of the seizure". The seizure, to be sure, was constitutional within the meaning of *Stoehr, supra*. The "propriety of the seizure" has, however, never

been determined in Petitioners' case. The District Court in *Von Clemm* v. *Smith*, 255 F. Supp. 353 (S.D. NY 1965) 255 F. Supp. 353 (S.D.N.Y. 1965) aff'd 363 F. 2d 19 (2d Cir. 1966), cert. den. 385 U.S. 975 (1966), did not reach the question of title. The Attorney General's obligations to rule on the question of title is also clearly expressed in *Subsection 10 of Executive Order 9095*, promulgated March 11, 1942, *7 F. R. 1971*, which states:

> "For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me (the President of the United States) by section 5(b) of the Trading With the Enemy Act, as amended."

The Respondents' memorandum (p. 2) states:

> "The district court. . . (found) that Von Clemm was an "enemy" within the purview of the Act."

The term "enemy" under the Act (§§ 2 and 9) applies to enemy nationals or enemy entities and to persons of whatever nationality, domiciled in enemy territory. The term does not apply to resident United States citizens. The term "enemy" includes:

> "individuals. . . as may be natives, citizens or subjects of any nation. . . with which the United States is at war, *other than citizens of the United States. . .* " (2c) (Emphasis ours).

The holding of Von Clemm v. Smith *supra* is that Von Clemm lacked standing to claim return under § 9 of the Act because Von Clemm, whom the court found to have been an agent of the German government prior to December 7, 1941, failed to prove that he had ceased to be such an agent after December 7, 1941. Failure to prove a "negative" (Opinion, p. 369) does not make a United States citizen an "enemy" under the Act. Therefore, the court in *Von Clemm* v. *Smith*, supra, failed to find that Von Clemm was in fact

an "enemy" within the meaning of the Act.

The court recognized that the term "enemy" could not be applied to a United States resident-citizen claimant prior to December 11, 1941. The court was careful in distinguishing between the term "agent" and "enemy". The Court of Appeals clearly draws the distinguishing line by stating in *Von Clemm* v *Smith*, 363 F. 2d 19 (2d Cir. 1966):

> ". . . all the parties recognize, it is Von Clemm's status *after* December 11, 1941. . . that determines whether he is an enemy." At p. 23 (Emphasis ours).

The Court of Appeals moreover found:

> "none of the evidence is conclusive. . . the only relevance of . . . events is insofar as they meet his (Von Clemm's) burden." *Ibid.*

The "burden of proof" question is the only one the Court of Appeals considered. The court did not consider the property rights of United States resident-citizen claimants under the Act, nor under the United States Constitution. The Court did not determine "enemy" or "non-enemy" ownership as required by *Stoehr v. Wallace*, supra. and *Societe Internationale v. Rogers*, supra. a requirement also clearly expressed in *Executive Order 9095*, supra.

The Government has conceded that the present § 32 action is a trial *de novo*. In a trial *de novo* "the most extensive judicial scrutiny includes determination of 'jurisdictional' or 'constitutional facts'" (Opinion of Court of Appeals, p. 6). The principal issue in the present action is petitioners' property rights, and the safeguards the law and the United States Constitution provide pertaining to such rights. At issue also is administrative discretion, and the constitutional restraint under which it must be exercised.

Respectfully submitted,

CHARLES B. SWARTWOOD III,

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November 1974